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In the Supreme
OF THE
United States

JAN 28 1916

JAMES D. MAHER
CLERK

OCTOBER TERM, 1915
No. 300

PACIFIC LIVE STOCK COMPANY,

Appellant,

vs.

JOHN H. LEWIS, JAMES T. CHINNOCK and GEORGE T. COCHRAN, constituting the State Water Board for the State of Oregon; C. B. McCONNELL, EMORY COLE, and LEONARD COLE; HARNEY VALLEY IMPROVEMENT Co. (a corporation); SILVIES RIVER IRRIGATION COMPANY (a corporation), and WILLIAM HANLEY COMPANY (a corporation); R. R. SITZ, FRED OTLEY and M. B. HAYES,

Appellees.

BRIEF FOR APPELLANT.

EDWARD F. TREADWELL,

Solicitor for Appellant.

ALEX. BRITTON,

EVANS BROWNE,

F. W. CLEMENTS,

Of Counsel.

Filed this _____ day of _____, 1916.

JAMES D. MAHER, Clerk

By _____ Deputy Clerk.

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- Two hundred and four (204) claimants having filed claims in the adjudication proceeding contesting the right of the Pacific Live Stock Company and the Harney Valley Improvement Company, Silvies River Irrigating Company and William Hanley Company, having likewise filed their claims and contested the right of the Pacific Live Stock Company, and the Pacific Live Stock Company having likewise under protest filed its claim and protested the right of all other parties..... 22 - 26
- The Pacific Live Stock Company filed its bill of complaint in the United States District Court alleging the facts aforesaid, that the state board had adopted a rule requiring complainant as contestant to not only prove its own rights but to disprove the right of all persons contested by it; that if any claim is not contested by it the same will be determined as a prior right as against complainant, and the water forcibly and actually taken from it and given to such claimant; that as a condition to the right of complainant to appear and protect its rights the board exacted a sum exceeding \$400; that the cost to complainant to prove its rights and disprove the claims of others would be \$50,000; that the proceeding interfered with the cases already pending in the federal court between the same parties, interfered with the jurisdiction conferred by the removal of the proceeding to the federal court, and resulted in compelling complainant to either forfeit its property or expend upwards of \$50,000 to prevent a mere administrative board from determining them to be non-existent, and from proceeding to carry out its determination by a physical taking of the water claimed by complainant and giving the same to some other claimant, and therefore involves the taking of complainant's property without due process of law and deprives it of the equal protection of the law... 26 - 35
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- I. (a) Assuming that the proceeding for the determination of water rights provided by the act of 1909 is, as the United States District Court holds, merely an "administrative" proceeding, which can not finally determine vested rights, then the act is unconstitutional and deprives the complainant of its vested rights without due process of law, and deprives it of the equal protection of the law, and takes its property without compensation, all in violation of the fourteenth amendment to the Constitution of the United States, particularly because it compels complainant to come in and set up and have its rights determined on pain of forfeiting them, and, if it does come in, imposes upon complainant, first, the payment of certain sums as a condition of appearing and setting up its claims at all, and then compels it to pay all the expenses of the proceeding, admitted to amount to \$50,000, and if other persons file claims to water which conflict with its claims, such claims are adjudicated in their favor as prior and superior to the rights of complainant, unless they are contested by complainant, and if contested, complainant is compelled to assume the burden of proof and disprove the existence of the rights claimed, and if it does not do so, such rights are allowed and the water allotted accordingly; and then the state water board is also made executioner as well as judge, and given power to actually and physically take the water and distribute it in accordance with its "determination", which means that if the complainant

refuses to submit to the exactions and fails to come in or to assume and discharge this burden, its water is entirely taken away; if it does come in but fails to contest conflicting claims, those claims are allowed and the water taken from complainant and given to the opposing claimants, and if it does contest such adverse claims, it must affirmatively disprove their existence and priority, and failing such proof the same are allowed and physically delivered to such claimants as against complainant.

- (b) That such a law deprives complainant of its property without due process of law, and deprives it of the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States, and, if it be claimed that such a law is for the benefit of the "public" in order to ascertain what water may still remain unappropriated and subject to the rights of the "public", it is unconstitutional for all these reasons, and also for the reason that it takes complainant's property, to wit: fifty thousand (\$50,000.00) dollars if it submit to the law and its water for twenty-six thousand (26,000) acres if it refuse to submit, for a public use, without compensation, which is equally a taking without due process of law; or if the proceeding and act is claimed to be (as is alleged in the complaint and admitted by the demurrer or motions to dismiss), for the private benefit of certain individual parties defendant herein who desires to appropriate such surplus water, the act is likewise unconstitutional as taking private property, viz.: the money and

water right of plaintiff, for a private use, which is equally a taking without due process of law in violation of the fourteenth amendment of the constitution of the United States.

- II. If, however, the act be held to provide a judicial proceeding for the determination of water rights, the parties thereto and defendants herein as distinguished from the persons constituting the tribunal, should be enjoined from prosecuting the proceeding so as to interfere with prior suits pending in the federal courts between complainant and these same defendants, and involving the existence and extent of the same rights involved in such proceeding.
- III. If the proceeding authorized by the act of 1909 be held to be a judicial proceeding for the final and conclusive determination of water rights, then the same, being instituted by citizens and residents of Oregon against complainant, a citizen and resident of California, was removable to and actually removed into the United States District Court, and the legislature, by creating a new form of proceeding and a new tribunal, could not prevent such removal, and the defendants, having proceeded in disregard of the removal, to the damage of complainant, this bill in equity will lie to restrain further proceedings by them.
- IV. The jurisdiction of the federal courts can not in any way be affected, abridged or defeated by state legislation prescribing new or different modes of procedure for the determination of civil rights, or creating special tribunals to determine such rights, or prescribing new forms of procedure for the ascertainment and determination thereof.

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ARGUMENT.

I.

IF IT BE HELD THAT THE PROCEEDING TO DETERMINE WATER RIGHTS IS MERELY AN "ADMINISTRATIVE" PROCEEDING, WITH NO POWER TO FINALLY JUDICIALLY DETERMINE VESTED RIGHTS, THEN, SO FAR AS IT ATTEMPTS TO AFFECT VESTED RIGHTS, IT AMOUNTS TO AN UNCONSTITUTIONAL INTERFERENCE WITH PROPERTY RIGHTS, AND DEPRIVES THE PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND TAKES PLAINTIFF'S PROPERTY FOR A PUBLIC OR PRIVATE USE WITHOUT COMPENSATION.....	40
(a) A water right by appropriation or by virtue of riparian ownership is a vested right of property as much as the land on which it is enjoyed or of which it is a part.....	41
<i>San Joaquin & Kings River Canal & Irrigation Company v. Stanislaus County</i> , 233 U. S. 454; 34 Sup. Ct. Rep. 652; 58 L. ed. 1041;	
<i>Palmer v. Railroad Commission of the State of California</i> , 167 Cal. 163; 138 Pac. 997.	

- (b) If such a taking of property be deemed a taking for a public use, then it is taken without compensation, and the taking of private property for public use without compensation is a taking without due process of law..... 41
Chicago etc. R. R. Co. v. Chicago, 166 U. S. 266; 41 L. ed. 979.
- (c) If such taking be considered as for the private benefit of other appropriators, then the taking of private property for a private use is equally in violation of the due process provision of the constitution..... 41
Davidson v. Board of Administrators of New Orleans, 96 U. S. 97; 24 L. ed. 616.
- (d) Even when the state desires to take the property of an individual for public use, and proceeds to do so by the ordinary process of eminent domain, the owner cannot be made to bear any portion of the expense incident to such proceeding, either in the trial court or in any appellate court, to which the proceeding may be taken by either side..... 41
San Diego L. & T. Co. v. Neale, 88 Cal. 50, 67; 25 Pac. 977; 11 L. R. A. 604;
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Carr v. Brown, (R. I.) 38 Atl. 9;
Chicago etc. Co. v. Chicago, 166 U. S. 226; 41 L. ed. 979;
Twining v. New Jersey, 211 U. S. 78; 53 L. ed. 97; 29 Sup. Ct. 14.

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<i>United States v. Throckmorton</i> , 4 Sawyer 42, Federal Case No. 15,121;	
<i>Botiller v. Dominguez</i> , 130 U. S. 238; 32 L. ed. 926.	
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Anderson v. Kearney, 37 Nev. 314;
142 Pac. 803.

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Pacific Live Stock Co. v. Cochran,
73 Ore. 417; 144 Pac. 668.

- (i) Of course it is well settled that a decision of the highest court of a state construing an act of the legislature of the state is binding and conclusive in the federal courts..... 60
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Note to *Forepaugh v. Del. etc. R. Co.*,
5 L. R. A. 508;

Esty's Fed. Procedure, 9th ed., pages
808 et seq.

II.

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<i>Harkrader v. Wadley</i> , 172 U. S. 148, 164 (1898);	
<i>Proutt v. Starr</i> , 188 U. S. 537, 544 (1902);	
<i>Ex parte Young</i> , 209 U. S. 123, 161, 162 (1907);	
<i>Rickey Land & Cattle Co. v. Miller & Lux</i> , 218 U. S. 258, 262; 54 L. ed. 1032 (1910);	
<i>Pitt v. Rodgers</i> , 104 Fed. 387, 390 (C. C. A., 9th Cire., 1900);	
<i>Mercantile etc. Co. v. Roanoke etc. Co.</i> , 109 Fed. 3, 6 (C. C., Va., 1901);	
<i>Iron Mountain R. Co. v. Memphis</i> , 96 Fed. 113, 131 (C. C. A., 6th Cire. 1899);	
<i>Home Ins. Co. v. Virginia etc. Co.</i> , 109 Fed. 681, 689 (C. C., S. C., 1901);	
<i>Starr v. Chicago etc. Co.</i> , 110 Fed. 3, 6 (C. C., Neb. 1901);	
<i>State Trust Co. v. Kansas City etc., Co.</i> , 110 Fed. 10, 12 (C. C., Mo., 1901);	
<i>Central Trust Co. v. Western etc. Co.</i> , 112 Fed. 471, 476 (C. C., U. S., 1901);	
<i>Stewart v. Wisconsin Cent. R. Co.</i> , 117 Fed. 782, 783 (C. C., Ill., 1902);	
<i>Equitable Trust Co. of N. Y. v. Rollitz</i> , 207 Fed. 74 (C. C. A., 2nd Cire., 1913);	
<i>French v. Hay</i> , 22 Wall. 238, 253;	
<i>Dietzsch v. Huidekoper</i> , 103 U. S. 494;	
<i>Western Union Telegraph Co. v. L. & N. R. Co.</i> , 201 Fed. 919, 922 (C. C. A., 7th Cire., 1912);	
<i>St. Louis I. M. & S. Ry. Co. v. Bellamy</i> , 211 Fed. 172 (Dist. Ct., Ark., 1914).....	61- 62

III.

IF IT SHOULD BE HELD THAT THE ADJUDICATION PROCEEDING IS A JUDICIAL PROCEEDING FOR THE FINAL DETERMINATION OF WATER RIGHTS, THEN THE COMPLAINANT WAS ENTITLED TO HAVE THE SAME REMOVED INTO THE FEDERAL COURT, AND IT HAVING TAKEN ALL OF THE PROCEEDINGS NECESSARY TO REMOVE THE SAME INTO THAT COURT, THIS SUIT WILL LIE TO RESTRAIN PROCEEDINGS BEFORE THE STATE BOARD AFTER SUCH REMOVAL TO THE FEDERAL COURT.....

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Where case is removed bill in equity will lie to restrain proceedings in state court.

Madisonville Traction Co. v. St. Bernard Mining Co., 106 U. S. 239, 244; 49 L. ed. 462, 464;

Wagner v. Drake, 31 Fed. 849, 853 (Dist. Ct. Iowa, 1887);

B. & O. R. R. Co. v. Ford, 35 Fed. 170, 173 (C. C., W. Va., 1888);

Abeel v. Culberson, 56 Fed. 329, 331 (C. C., Tex., 1893);

Mutual Life Ins. Co. v. Longley, 145 Fed. 415 (C. C., S. C., 1906);

C. R. I. & P. R. Co. v. Stepp, 151 Fed. 908 (C. C., Mo., 1907); affirmed in 164 Fed. 985;

M'Allister v. C. & O. Ry. Co., 157 Fed. 740, 743 (C. C. A., 6th Circ., 1907);

Donovan v. Wells Fargo & Co., 169 Fed. 363, 371 (C. C. A., Mo., 1909).....

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The proceeding was removable:

- (a) The suggestion that a proceeding to determine water rights is in the nature of a partition suit and therefore not removable is not sustainable, for the reason that it is universally held that appropriators of water are not tenants in common, nor joint tenants, but that the right of each is separate.

Foreman v. Boyle, 88 Cal. 290;

Senior v. Anderson, 138 Cal. 716, 723;

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<i>Norman v. Corbley</i> , 32 Mont. 195; 79 Pac. 1059-1061;	
<i>City of Telluride v. Davis</i> , 33 Colo. 353; 80 Pac. 1051-1052;	
<i>Hildreth v. Montecito Creek W. Co.</i> , 139 Cal. 22;	
<i>M'Mullen v. Halleck Cattle Co.</i> , 193 Fed. 282;	
<i>Starnbrough v. Cook</i> , 38 Fed. 369;	
<i>Connell v. Smiley</i> , 156 U. S. 335; 15 Sup. Ct., 353;	
<i>Sharp v. Whiteside</i> , 19 Fed. 150;	
<i>Fritzlen v. Boatmen's Bank</i> , 212 U. S. 364; 29 Sup. Ct. 366; 53 L. ed. 551;	
<i>Elkins v. Howell</i> , 140 Fed. 157;	
<i>Boom Co. v. Patterson</i> , 98 U. S. 403; 25 L. ed. 206;	
<i>Railroad Removal Case</i> , 115 U. S. 1; 29 L. ed. 319;	
<i>Searl v. School District</i> , 124 U. S. 197; 8 Sup. Ct. 460; 31 L. ed. 415;	
<i>Madisonville Træction Co. v. St. Bernard Mining Co.</i> , 196 U. S. 239; 25 Sup. Ct. 251; 49 L. ed. 462;	
<i>Railroad Co. v. McKell</i> , 75 Fed. 34;	
<i>Deep Water Ry. Co. v. Western etc. Co.</i> , 152 Fed. 824.....	68 - 71
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<i>Wattles v. Baker County</i> , 59 Or. 255; 117 Pac. 417;	
<i>Gray's Nature & Sources of Law</i> , p. 110	72
(c) If the suggestion be adopted that the proceeding is to all intents and purposes in the court all the time and the board "is in effect a standing examiner, created by	

the state, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be authoritatively settled and determined by a judicial tribunal"—then we are as much entitled to have the evidence taken and the facts found in the federal courts as we are to have the adjudication made therein. This is directly decided in the following cases:

Prentiss v. Atlantic Coast Line Co., 211

U. S. 210, 288; 53 L. ed. 150;

Smyth v. Ames, 169 U. S. 478; 42 L. ed. 819;

Willcox v. Con. Gas. Co., 212 U. S. 19;

Des Moines Street Ry. Co. v. Des Moines,
151 Fed. 854.....

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- (d) The third ground relied upon, namely, that the proceeding is by the state, finds no support in the act. The state has no title to the water whatever.

Howell v. Johnson, 89 Fed. 556;

Palmer v. Railroad Com., 167 Cal. 163;

Keene v. Smith, 44 Or. 525; 75 Pac. 1065

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- (e) The main ground, however, for the contention that the proceeding is not removable is the claim that the proceeding is administrative and not judicial. The proceeding is judicial no matter what may be the nature of the action of certain officials therein.

People v. Hayne, 83 Cal. 111;

Re Silvies River, 199 Fed. 495.....

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- (f) The next thing that should be carefully noted is that there is one, and only one, proceeding provided or contemplated from the inauguration of the proceeding.....

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IV.

THE JURISDICTION OF THE FEDERAL COURTS CAN NOT IN ANY WAY BE AFFECTED, ABRIDGED OR DEFEATED BY STATE LEGISLATION PRESCRIBING NEW OR DIFFERENT MODES OF PROCEDURE FOR THE DETERMINATION OF CIVIL RIGHTS, OR CREATING SPECIAL TRIBUNALS TO DETERMINE SUCH RIGHTS, OR PRESCRIBING NEW FORMS OF PROCEDURE FOR THE ASCERTAINMENT AND DETERMINATION THEREOF.....

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Wheeling Bridge Case, 13 How. 518; 14 L. ed. 249, 268;

Dodge v. Woolsey, 18 How. 331; 15 L. ed. 401, 407;

Barber v. Barber, 21 How. 582; 16 L. ed. 226, 229;

Payne v. Hook, 7 Wall. 425; 19 L. ed. 260;

Mississippi Mills v. Cohn, 150 U. S. 202; 37 L. ed. 1052;

Williams v. Crabb, 117 Fed. 193;

Ray v. Tatum, 30 U. S. App. 635; 72 Fed. 112;

Robinson v. Campbell, 3 Wheat. 212; 4 L. ed. 372;

Lorman v. Clarke, 2 McLean 568;

Fletcher v. Morey, 2 Story 555;

Gordon v. Hobart, 2 Sumn. 401;

Parsons v. Lyman, 5 Blatchf. 170;

Lawrence v. Nelson, 143 U. S. 215; 36 L. ed. 130;

Suydam v. Broadnax, 14 Pet. 67;

Union Bank v. Vaiden, 18 How. 502;

Hyde v. Stone, 20 How. 170, 175;

Hess v. Reynolds, 113 U. S. 73;

Borer v. Chapman, 119 U. S. 587;

Byers v. McAuley, 149 U. S. 608;

Brun v. Mann, 80 C. C. A. 513; 151 Fed. 145; 12 L. R. A. (N. S.) 154;

Craigie v. McArthur, Fed. Case 3341; 4 Dall. 474;

Foley v. Hartley, 72 Fed. 570;

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<i>In re Foley</i> , 76 Fed. 390;	
<i>Toms v. Owen</i> , 52 Fed. 417;	
<i>Wood v. Paine</i> , 66 Fed. 807;	
<i>Heaton v. Thatcher</i> , 59 Fed. 731;	
<i>Wickham v. Hull</i> , 60 Fed. 326;	
<i>Zimmerman v. Carpenter</i> , 84 Fed. 747;	
<i>Brown v. Ellis</i> , 86 Fed. 357;	
<i>Domestic & Foreign Missionary Soc. v. Gaither</i> , 62 Fed. 422;	
<i>Continental Nat. Bank v. Heilman</i> , 81 Fed. 36;	
<i>Brendel v. Charch</i> , 82 Fed. 262;	
<i>In re Cilley</i> , 58 Fed. 977;	
<i>Comstock v. Heron</i> , 55 Fed. 803;	
<i>Martin v. Fort</i> , 83 Fed. 19;	
<i>Hayes v. Pratt</i> , 147 U. S. 557;	
<i>Jordan v. Taylor</i> , 98 Fed. 643, 646;	
<i>Hale v. Coffin</i> , 114 Fed. 567, 574-5;	
<i>Hale v. Tyler</i> , 115 Fed. 833, 834-5;	
<i>Carrau v. O'Calligan</i> , 125 Fed. 657, 663;	
<i>Gallivan v. Jones</i> , 102 Fed. 423, 427;	
<i>In re Jarnecke Ditch</i> , 69 Fed. 161;	
<i>Colorado Midland Ry. v. Jones</i> , 29 Fed. 193;	
<i>Goldney v. Morning News</i> , 156 U. S. 518, 523;	
<i>Black's Dillon on Removal of Causes</i> , secs. 22, 90 and 148;	
"A Federal Equity Suit", by Simkins, p. 828;	
<i>Barney v. Globe Bank</i> , Fed. Cas. No. 1031;	
<i>Richmond v. Brookings</i> , 48 Fed. 241.....	80- 87

V.

A PROCEEDING FOR THE ADJUDICATION OF RELATIVE WATER RIGHTS AS BETWEEN PRIVATE INDIVIDUALS IS A JUDICIAL PROCEEDING AND IS A CASE WITHIN THE MEANING OF THE FEDERAL STATUTES REGARDING THE RIGHT OF REMOVAL	87
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1. Definition of judicial power, judicial proceedings, actions, suits and cases:

<i>Johnston v. Commonwealth</i> , 1 Bibb. 598;	
<i>State v. Newell</i> , 13 Mont. 302; 34 Pac. 28;	

- People v. Rensselaer County Judge*, 13 How. Pr. 398;
McBride's Appeal, 72 Penn. St. 480;
Jacoby v. Shafer, 105 Penn. St. 610;
Cohens v. Virginia, 6 Wheaton 407;
Marion v. Ganby, 68 Iowa 142; 26 N. W. 40;
Harris v. Phoenix Insurance Co., 35 Conn. 10;
Osborne v. U. S. Bank, 9 Wheaton 738, 819;
Ex parte Milligan, 4 Wallace 2;
People v. Board of Education, 54 Cal. 375;
Field, J., in Sinking Fund Cases, 99 U. S. 761;
Smith v. Strother, 68 Cal. 194;
Wulzen v. Supervisors, 101 Cal. 15;
Grider v. Tully, 77 Ala. 424;
Hereford v. People, 197 Ill. 22; 64 N. E. 310, 312;
Morton v. Simpkins, 20 Colo. 438; 38 Pac. 1092 87 - 90
2. The tribunals given jurisdiction in the adjudication proceeding are courts:
 3 *Bla. Com.* 23;
 Stenberg v. State, 48 Neb. 312;
 Tissier v. Rhein, 130 Ill. 110;
 In re Allison, 13 Colo. 528;
 Schouliz v. McPheeters, 79 Ind. 376;
 Mason v. Woerner, 18 Mo. 570;
 White County v. Gwinn, 136 Ind. 562;
 Malone v. Murphy, 2 Kans. 250;
 People v. Van Allen, 55 N. Y. 31 90
3. Proceedings to adjudicate water rights before state boards held to be judicial:
 Wattles v. Baker County, (Or.) 117 Pac. 417;
 Appeal of Cleghorn, 3 Hawaii 216;
 Palolo etc. Co. v. Territory, 18 Hawaii 30;
 Thorp v. Woolman, 1 Mont. 168;
 Farm Inv. Co. v. Carpenter, 9 Wyo. 110; 61 Pac. 258;
 Whiting v. Townsend, 57 Cal. 515;

<i>Tyler v. Judges</i> , 175 Mass. 71; 55 N. E. 812;	
<i>Anderson v. Kearney</i> , 37 Nev. 314, decided August 10, 1914; 142 Pac. 803;	
<i>Kinney on Water Rights</i> , 2 Ed., Vol. III, p. 2901	91 - 98

4. The fact that the proceeding is before the state water board does not prevent it from being a "case" and removable:

<i>Waha-Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.</i> , 158 Fed. 137;	
<i>Boom Co. v. Patterson</i> , 98 U. S. 403; 25 L. ed. 206;	
<i>Railroad Removal Cases</i> , 115 U. S. p. 1; 29 L. ed. 319;	
<i>Scarl v. School District</i> , 124 U. S. 197; 8 Sup. Ct. 460; 31 L. ed. 415;	
<i>Traction Co. v. St. Bernard Min. Co.</i> , 196 U. S. 239; 25 Sup. Ct. 251; 49 L. ed. 462;	
<i>Colorado Midland Ry. v. Jones</i> , 29 Fed. 193;	
<i>Mineral Range R. Co. v. Detroit etc. Co.</i> , 25 Fed. 515	98 - 101

5. The power here claimed to be "non-judicial" has in other cases been held or assumed to be so strictly "judicial" that it could be vested only in a court or other body authorized to perform judicial functions:

<i>People v. Chase</i> , 165 Ill. 527; 26 L. R. A. 165;	
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1915.

No. 300

PACIFIC LIVE STOCK COMPANY,

Appellant,

VS.

JOHN H. LEWIS, JAMES T. CHINNOCK and GEORGE T. COCHRAN, constituting the State Water Board for the State of Oregon; C. B. McCONNELL, EMORY COLE, and LEONARD COLE; HARNEY VALLEY IMPROVEMENT CO. (a corporation); SILVIES RIVER IRRIGATION COMPANY (a corporation), and WILLIAM HANLEY COMPANY (a corporation); R. R. SITZ, FRED OTLEY and M. B. HAYES,

Appellees.

BRIEF FOR APPELLANT.

Nature of Case.

This is an appeal from a judgment of the United States District Court for the District of Oregon, dismissing the bill of complaint (Fol. 60), upon demurrers interposed thereto (Fols. 31-39) and considered by the court as motions to dismiss (Fol. 45). The only questions presented, therefore, are whether the complaint states a cause of action, and (the appeal being direct

to this court from the district court), whether appellant bases its rights upon the Constitution of the United States.

The Facts.

The facts set up in the bill of complaint, together with certain facts of which the court takes judicial notice, are as follows:

WATER LAWS OF OREGON.

The State of Oregon was admitted to the Union in 1859, and upon its admission became entitled to all swamp and school lands within the state.¹

Ever since the admission of the state the common law of England has been recognized as the law of the state.²

From the earliest times this was held to include the so-called riparian doctrine, or the right of the owner of land bordering upon a stream to the flow and use of the water of the stream.³

This doctrine has not been departed from by the Supreme Court of Oregon, but as to land patented by the United States Government since the passage of the Desert Land Act of March 3, 1877, it is now held that no riparian rights in land patented since that time passed from the Government, except the right to water for domestic use, watering of stock and irrigation for family use, on

¹ (Act of Congress approved February 14, 1859; Act of Congress approved March 12, 1860, sec. 1; Act of Legislature of Oregon approved June 3, 1859; 1 Lord's Laws of Oregon, pp. 25, 28, 59.)

² ("All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." Const. of Oregon, sec. 7, Art. XVIII; *Cressey v. Tatom*, 9 Or. 541; *Quinn v. Ladd*, 37 Or. 261.)

³ (*Taylor v. Welch*, 6 Or. 198; *Coffman v. Robbins*, 8 Or. 278; *Hayden v. Long*, 8 Or. 344; *Shively v. Hume*, 10 Or. 76; *Shaw v. Oswego Iron Co.*, 10 Or. 371; *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Weiss v. Oregon Iron Co.*, 13 Or. 496, 11 Pac. 255; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662; *Jones v. Conn*, 39 Or. 30, 64 Pac. 855; *Cox v. Bernard*, 39 Or. 53, 64 Pac. 860; *Morgan v. Shaw*, 47 Or. 337, 83 Pac. 534; *Ison v. Nelson Mining Co.*, 47 Fed. 199; *Brown v. Gold Mining Co.*, 48 Or. 277, 86 Pac. 361; *Oregon Con. Co. v. Allen Ditch Co.*, 41 Or. 209; 69 Pac. 456; *Williams v. Altnow*, 51 Or. 275, 95 Pac. 202.)

account of certain provisions contained in that act. (*Hough v. Porter*, 51 Ore. 318.) The correctness of this decision has never been passed upon by this court, and is not involved in this case.⁴

Subject to the rights of riparian owners as above defined, the state has always recognized rights to water acquired by "appropriation".⁵

**RIGHTS OF COMPLAINANT, PACIFIC LIVE STOCK COMPANY, AS
RIPARIAN OWNER AND APPROPRIATOR.**

It appears that this complainant, Pacific Live Stock Company, is a corporation, incorporated under the laws of the State of California, and is a citizen and resident of that state. (Fol. 2.) It is the owner of a large tract of land situate in Harney Valley, Harney County, Oregon, and generally known and referred to as the Island Ranch, consisting of upwards of twenty thousand (20,000) acres of land, and is also the owner of another large tract of land situate in Silvies Valley in the County of Harney and the County of Grant, State of Oregon, generally referred to as the Silvies Valley Ranch, consisting of upwards of six thousand (6,000) acres of land (Fol. 3); that both of said parcels of land lie along and border upon the Silvies River and its tributaries, and the said river now flows, and from time immemorial has flowed, by, through, over and upon the said lands, and for many years the complainant has

⁴ The decision of the Oregon court on this subject was disapproved by the Supreme Court of Washington. *Still v. Palouse Irrigation & Power Co.*, 117 Pac. 466.

⁵ (*Taylor v. Welch*, 6 Or. 198; *Kaler v. Campbell*, 13 Or. 596; *Slimmons v. Winters*, 21 Or. 35; *Hindman v. Rizor*, 21 Or. 112; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568; *Low v. Rizor*, 25 Or. 551, 37 Pac. 82; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642; *Oregon Const. Co. v. Allen D. Co.*, 41 Or. 209, 69 Pac. 455; *Glaze v. Frost*, 44 Or. 29, 74 Pac. 336; *Bolter v. Garrett*, 44 Or. 304, 75 Pac. 142; *Morgan v. Shaw*, 47 Or. 333, 83 Pac. 534; *McRae v. Small*, 48 Or. 139, 85 Pac. 503; *Williams v. Altnow*, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083; *Caviness v. La Grande Irr. Co.*, 60 Or. 410, 119 Pac. 731; *In re Schollmeyer*, 69 Or. 210, 138 Pac. 211; *Ison v. Nelson M. Co.*, 47 Fed. 199.)

taken, diverted and used the waters of said Silvies River, and its tributaries, for the irrigation of its said land, and for the watering of stock, and other purposes, and at all times has claimed the right to take, divert and use the water of the said river and its tributaries for the irrigation of the said land, the watering of stock, and other beneficial purposes (Fol. 4); that many thousands of acres of said land passed from the United States Government to the State of Oregon upon its admission to the Union as swamp land, and as school land, and all of said lands were, and are, riparian to Silvies River and its tributaries, and have all the rights in and to the waters of the said river belonging to such riparian lands, and, by virtue of such riparian right, are entitled to the use and benefit of the waters of the said river for irrigation, watering of stock and other purposes; said lands are entitled to all of the natural advantages growing out of said situation and location with respect to the flow of the said river, and all of said lands have, for more than thirty (30) years passed from the State of Oregon to complainant, together with all of the riparian rights incident to the said lands, and that for more than thirty (30) years complainant has so taken, diverted, used and enjoyed the waters of the said river so riparian to the said land, and its right to so take and use the water vested in complainant long before the passage of the act of the State of Oregon of 1909 hereinafter referred to; that on and upon other portions of the said lands, the said complainant and its predecessors have for more than thirty (30) years taken, diverted, appropriated and used a large part of the waters of the said river for the irrigation of the said lands and all the waters so appropriated by the complainant, its predecessors and grantors, was taken, diverted and appropriated long before the passage of the act of the legislature of the State of Oregon of 1909, hereinafter referred to, and all of said rights were vested property rights of the complainant long before the passage of said act. (Fols. 20-21.)

PRIOR JURISDICTION OF THE FEDERAL COURT.

Complainant's rights being as above set forth, it appears that heretofore and in the year of 1908, this complainant filed its bill of complaint in the District Court of the United States for the District of Oregon against the defendants herein, Harney Valley Improvement Company (a corporation) and Silvies River Irrigation Company (a corporation), alleging that the said defendants threatened to take, appropriate and divert away from the said river and away from the lands of the complainant a large amount of the water of the said Silvies River to the great damage of complainant, and prayed that the said defendants be enjoined and restrained from taking, diverting or appropriating any of the waters of the said river above the lands of said complainant, or any thereof, and thereafter the said defendants duly appeared and answered the said bill of complaint, denying the rights of the said complainant as alleged in its bill of complaint and claiming the right to take, divert and carry away a large amount of the water of the said river, and asking that their right to do so be adjudged in their favor and as against said complainant; that thereafter complainant duly filed its replication in due form of law to the answer aforesaid, and the said suit has ever since been and now is at issue, pending and undetermined in the District Court of the United States for the District of Oregon, and said suit involves all of the rights of the said complainant herein in and to the waters of the said Silvies River and all of the rights claimed by the defendants Harney Valley Improvement Company and Silvies River Irrigation Company in and to the waters of the said river as against the said complainant.

In the year 1908 this complainant filed in the District Court of the United States for the District of Oregon its bill of complaint against the William Hanley Company (a corporation), alleging that the said defendant was taking and diverting water from the said Silvies River and was maintaining structures in the said river and in the banks thereof which were interfering with and encroaching upon the rights of the said complainant

in and to the waters of the said Silvies River, and praying that the said defendant be enjoined and restrained from continuing such taking, diversion and use of said waters, and from maintaining the other structures in and upon the said river which were complained of by the said complainant; that thereafter the said defendant William Hanley Company duly appeared and filed its answer to the said bill of complaint, claiming the right to divert, and use, certain waters of said river and to maintain and operate said structures and works in and upon the said river, and denying that the same unlawfully interfered with the rights of the complainant; that thereafter the said complainant duly filed its replication to said answer and said suit has ever since been, and now is, pending and undetermined in the District Court of the United States for the District of Oregon, which said suit involves all of the rights of the said complainant as against the said William Hanley Company and all of the rights of the said William Hanley Company in and to the waters of the said river as against said complainant; and said rights so in litigation as aforesaid are still pending and undetermined in said suit in said court. (Fols. 4-5.)

WATER LAW OF OREGON OF 1909.

The conditions of law and fact being in this shape, the legislature of the State of Oregon, on the 24th day of February, 1909, passed an act entitled: "An act providing a system for the regulation, control, distribution, use and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency." The provisions of the act so far as material to this case, are as follows:^a

"Section 11. *Determination*.—Upon a petition to the board of control, signed by one or more water users upon any stream, requesting the determina-

^aTo avoid repetition we have italicized certain portions of the act, which are particularly important in this case.

tion of the *relative* rights of the various claimants to the waters of that stream, it shall be the duty of the board of control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determination of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. *In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the board of control for determination as in this act provided.*

“Section 12. *Notice of Proceedings.*—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the state engineer, or his assistants. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested.

Section 13. *Notice to Claimants.*—It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, in so far as such claimants and owners, and persons in possession, can reasonably be ascertained, a similar notice setting forth the date when the state engineer or his assistants will begin

the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 14. *Statement of Claimant.*—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

The name and postoffice address of the claimant.

The nature of the right or use on which the claim is based.

The time of initiation of such right or the commencement of such use, and if distributing works are required.

The date of beginning of construction.

The date when completed.

The date of beginning and completion of enlargements.

The dimensions of the ditch as originally constructed and as enlarged.

The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

Section 15. *Statement to Be Under Oath.*—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 16. *Testimony Taken by Division Superintendent.*—Upon the date named in the notice provided for herein for the taking of testimony, the

division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the board of control.

Section 17. *Fees.*—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1000 acres, and one cent for each acre in excess of 1000; also 25 cents for each theoretical horsepower up to and including 100 horsepower, and fifteen cents for each horsepower in excess of 100 up to and including 1000 horsepower, and five cents for each horsepower in excess of 1000 horsepower up to and including 2000 horsepower, and two cents for each horsepower in excess of 2000 horsepower, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be \$2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the board of control and paid by such board into the general fund to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

Section 18. *Notice upon Completion of Testimony.*—Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail

to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the board of control will be heard by the circuit court; *provided*, that said cause shall be heard in the county in which said stream or some part thereof is situate.

Section 19. *Contests*.—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

Section 20. *Hearing*.—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this state. Superintendents of water divisions shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served

in the same manner as subpoenas issued out of the circuit courts of the state, and shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 21. *Contests; Deposit Required.*—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the board of control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the board of control, who shall pay the same into the general fund of the state treasury upon adjournment of each regular meeting of the board.

Section 22. *Evidence Transmitted.*—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the board of control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

Section 23. *Measurements of Streams and Ditches.*—It shall be the duty of the state engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may

be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the state engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed.

Section 24. *Order Determining Water Rights.*—As soon as practicable after the compilation of said data, and the filing of said evidence, *it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream.* As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the board of control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which such determination is to be heard. *The determination of the board shall be in full force and effect from the date of its entry in the records of the board,* unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be heard in said court. Copies of this order, certified by the clerk of said court, shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

Section 25. *Water Right Certificate.*—Upon the final determination of the rights to the waters of

any stream, it shall be the duty of the secretary of the board of control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the board of control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the board of control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificates to the respective owners.

Section 26. *Court Procedure.*—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. *If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.*

All parties may be heard by counsel upon the consideration of the exceptions. The court may, if necessary, remand the case for such further evidence to be taken by the superintendent of the water division as it may direct, and may require a further determination by the board. *After the hearing, the court shall enter a decree affirming or modifying the order of the board of control.* Upon the hearing, the court may assess and adjudge against any party such costs as it may deem

just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

Section 27. *Clerk Shall Transmit Transcript to Clerk of Board.*—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the board of control. The secretary shall immediately enter the same upon the records of such office and the state engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

Section 28. *Distribution.*—During the time the hearing of the order of the board of control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the board of control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

Section 29. *Stay Bond.*—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the board of control a certified copy of such bond, which shall be recorded in the records by such board, and the state engineer shall immediately give notice thereof to the superintendent of the proper water division.

Section 30. *Rehearing.*—Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme

court, the board of control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the board of control and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. *Authorized to Administer Oaths.*—The members of the board of control may administer oaths in the performance of their official duties.

Section 32. *Fees.*—The secretary of the board of control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the state treasury by such board at the adjournment of each regular meeting; for making transcripts of the records of the board of control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

Section 33. *Conclusive, When.*—THE DETERMINATIONS OF THE BOARD OF CONTROL AS CONFIRMED OR MODIFIED AS PROVIDED BY THIS ACT IN PROCEEDINGS SHALL BE CONCLUSIVE AS TO ALL PRIOR RIGHTS, AND THE RIGHTS OF ALL EXISTING CLAIMANTS UPON THE STREAM OR OTHER BODY OF WATER LAWFULLY EMBRACED IN THE DETERMINATION.

Section 34. *Duty of Water Right Claimants.*—Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore ac-

quired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings, may at any time prior to the expiration of one year after the entry of the determination of the board, file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceeding. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 35. Proof Open to Inspection; Who May Contest.—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the board of control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in Section 18; and any persons, corporations, or associations who may desire to contest the claims or rights of other persons, corporations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in Sections 19, 20 and 22; *provided*, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.”

ADJUDICATION PROCEEDING.

It appears that under the provisions of this act a proceeding was thereafter instituted before the board of control of the State of Oregon (now known as the State Water Board of the State of Oregon)⁷ to have determined "the *relative* rights in and to the waters of Silvies River", as follows:

On the 18th day of November, 1911, R. R. Sitz, Fred Otley and M. B. Hayes filed a petition with said board of control of the State of Oregon, setting forth that they were users of the waters of the said Silvies River and that the waters of said stream and its tributaries were claimed by various claimants and praying that a determination of the relative rights of the various claimants to the said waters of said stream and its tributaries be made by said state board of control.

On the 22nd day of January, 1912, the said state board of control made and entered an order "In the matter of the determination of the relative rights in and to the waters of Silvies River, a tributary of Malheur Lake" for the determination of the relative rights to the waters of said river and directing that the state engineer proceed to make the surveys and examination of said stream as provided by law, and that the superintendent of water division No. 2 should commence the taking of testimony and report the various claims to the waters of said stream on the 26th day of August, 1912, at Silvies, on the 28th and 29th of August at Burns, on the 31st day of August, 1912, at Lawen, and from the 5th day of September to the 5th day of December, 1912, at La Grande; thereupon the said board caused to be published a notice setting forth therein the dates when the state engineer would begin an investigation of the flow of the stream and ditches diverting water therefrom, and the place and time when the superintendent of the water division in which the stream was situated would begin the taking of testimony as to the

⁷ ("An act to provide that the Board of Control, created by Chapter 216, General Laws of Oregon for 1909, shall be hereafter designated and known as 'State Water Board'." (Stats. of Oregon of 1914, p. 136.))

rights of the parties claiming water therefrom, which dates and places were as set forth in the aforementioned order, and said notice was published in two issues of one or more newspapers having general circulation in the counties in which said stream was situated; thereafter the said division superintendent of said division sent by registered mail to each person, firm or corporation claiming the right to the use of any water of said stream and to each person, firm or corporation claiming or in possession of land bordering upon and having access to said stream or its tributaries, in so far as such claimants could reasonably be ascertained, a similar notice setting forth therein when the state engineer or his assistant would begin the examination of said stream and the ditches diverting water therefrom and also the date when said superintendent would take testimony as to the rights of the waters of said stream and said dates were in accordance with the order above referred to, and said notice was mailed at least thirty days prior to the date set forth therein for the taking of said testimony; that one of said notices was so mailed to complainant herein, who is and at all times herein has been a claimant to the waters of said river and also owning and possessing land bordering upon and having access to said stream and its tributaries; that in and by the terms and provisions of the act of the legislature of the State of Oregon creating the said state board of control and providing for the proceedings above set forth it is provided that any person owning or claiming any right in and to the waters of said stream who shall fail to appear and file his claim in response to such notice in the manner provided by said act shall be deemed to have lost and forfeited all rights in and to the said stream and the waters thereof. (Fols. 6-7.)

REMOVAL PROCEEDING.

It appears that complainant, being a citizen and resident of the State of California, and the petitioners citizens and residents of the State of Oregon, took certain steps to remove the proceeding into the United States District Court for the District of Oregon, as follows:

On the 26th day of July, 1912, and within the time in which the complainant was required to appear in the said matter in accordance with the laws of the State of Oregon, the complainant duly filed with the said board of control a petition for the removal of the said proceedings in and to the District Court of the United States for the District of Oregon, in which petition all of the proceedings aforesaid were set up and alleged, and in which it was also alleged that said petitioner was a citizen and resident of the State of California; that the said R. R. Sitz, Fred Otley and M. B. Hayes were citizens of the State of Oregon, and that the controversy between the said R. R. Sitz, Fred Otley and M. B. Hayes, on the one part, and the said Pacific Live Stock Company, on the other, was a controversy wholly between citizens of different states and which could be fully determined between them, and in that behalf said petition alleged that said Pacific Live Stock Company claimed to have theretofore taken and appropriated a large amount of water of Silvies River and its tributaries and petitioner alleged that it had theretofore taken and diverted a large amount of the water of Silvies River and its tributaries and had applied the same to beneficial uses, to wit: the irrigation of land, watering of stock and domestic purposes, and that the said petitioners R. R. Sitz, Fred Otley and M. B. Hayes likewise claimed that they had taken and appropriated from Silvies River certain waters thereof and applied the same to beneficial uses, and that the Pacific Live Stock Company claimed that its appropriation of the said water was prior in time and superior in right to any right of the petitioners R. R. Sitz, Fred Otley and M. B. Hayes, and alleged that in fact its said appropriation and use of said water was prior in time and superior in right to any appropriation of said petitioners Sitz, Otley and Hayes, but that the said petitioners denied the appropriation by the said Pacific Live Stock Company of the amount of water claimed to have been appropriated by it and denied that said appropriation was prior in time and superior in right to the appropriation and use of the said water by the petitioners Sitz, Otley and Hayes, and that the controversy between the

said Pacific Live Stock Company and the said Sitz, Otley and Hayes involved the extent of the appropriations by the said Pacific Live Stock Company, on the one hand, and the said petitioners Sitz, Otley and Hayes on the other, and the relative priority thereof in point of time, and therefore in point of right, and that said controversy was a severable controversy between the said Pacific Live Stock Company and the said petitioners Sitz, Otley and Hayes, and that the said controversy could be fully determined as between them, and that the said matter in controversy, exclusive of costs of suit, exceeded in value the sum of three thousand dollars.

Prior to the filing of the said petition for removal and on the 16th day of July, 1912, the said Pacific Live Stock Company duly served upon the said petitioners Sitz, Otley and Hayes a written notice that the said petition would be filed, together with the bond required, with said board on the 26th day of July, 1912, at the hour of ten o'clock A. M. of said day at the office of said board of control in the Capitol Building in the City of Salem, State of Oregon, and thereafter and on the 26th day of July, 1912, at said hour and place the said petition was duly filed with the said board of control, together with the bond in the sum of one thousand dollars in favor of the said Sitz, Otley and Hayes, and duly executed by two sureties on behalf of the said Pacific Live Stock Company, conditioned that the said Pacific Live Stock Company should enter in said District Court of the United States within thirty days from the date of filing such petition for removal a certified copy of the record in said suit or proceeding, and should pay all costs that might be awarded by the said district court if the said court should hold that such proceedings were wrongfully or improperly removed thereto, and at the same time there was filed with said board notice of said application as aforesaid, together with due proof of the service thereon upon the said petitioners, Sitz, Otley and Hayes, and thereafter and within thirty days the said Pacific Live Stock Company duly filed in the District Court of the United States for the District of Oregon a certified copy of the entire record in the said proceed-

ing, and thereupon removed the same into the District Court of the United States for the District of Oregon.

MOTION TO REMAND.

Thereafter a motion was filed in said district court by the said R. R. Sitz, Fred Otley and M. B. Hayes, and others, setting forth that said proceeding was not a judicial proceeding but was an administrative proceeding before the state board of control, and praying that the said suit or proceeding be remanded to the said state board of control, and thereafter the District Court of the United States for the District of Oregon made its order declaring that the said suit or proceeding was not a judicial proceeding but was an administrative proceeding before the state board of control and remanding the said proceeding to the state board of control.^a (Fols. 7-10.)

ATTITUDE OF COMPLAINANT ON REMOVAL PROCEEDINGS.

The attitude of the complainant in seeking to remove the proceeding into the United States District Court was that the act of 1909 provided a proceeding for the final and conclusive determination of existing water rights; that such proceeding was necessarily judicial and not administrative, since it finally determined *vested property rights as between different persons*; that it created a tribunal which had certain duties to perform in making such determination; that whether its duties were or were not judicial, the *proceeding* was undoubtedly judicial in its nature and constituted a case at law or in equity; assuming that the act of the legislature providing for such a judicial proceeding and creating such tribunal was constitutional and valid, that by creating a new *form* of proceeding and a new *tribunal* the legislature could not interfere with the right of removal to the federal court when the requisite diversity of citizenship existed.

^a The decision of the District Court remanding the proceeding will be found reported in 199 Fed. 495.

Personally we still adhere to these views; but the United States District Court held that the proceeding was "administrative", which must be intended to mean that the proceeding did not constitute a proceeding in which vested rights of property might be finally and conclusively determined and adjudged as between different persons (for as we shall hereafter show any proceeding that does that is a "judicial proceeding"). While we still feel that the district court was in error in its view as to the nature of the proceeding contemplated by the act of the legislature, subsequent proceedings set forth in the bill of complaint are set forth on the theory that the proceeding is merely "administrative" and not judicial, and will not result in a final and conclusive determination and adjudication of the rights of the parties. On this phase of the case the bill of complaint alleges the following facts, which stand admitted by the demurrers.

SUBSEQUENT PROCEEDINGS BEFORE THE STATE BOARD OF CONTROL.

Thereafter the said Pacific Live Stock Company duly filed before the said state board of control a statement of its claims in and to the waters of the said Silvies River in the form required by the said statutes of the State of Oregon, and at the time of filing the same protested and stated that it filed the same under protest, claiming that said statute was unconstitutional and in violation of the constitution of the State of Oregon and of the United States; that the rights of the said Pacific Live Stock Company as against the said William Hanley Company, Silvies River Irrigation Company and Harney Valley Improvement Company and the rights of the last mentioned companies as against the Pacific Live Stock Company, in and to the waters of the said river, were then pending and undetermined in said suits in the District Court of the United States for the District of Oregon, and also protesting against having its rights determined by the state board of control, or by the courts of the State of Oregon, and protesting against

being deprived of its right to have its rights in and to the said waters determined by the United States courts in and for the State of Oregon, and it expressly filed the said statement of claim without waiving its right to have the said matters so determined and without waiving its claim that the said proceeding had been duly removed in and to the District Court of the United States for the District of Oregon, and without waiving its right to have the same tried therein, all of which protest and claims were set forth and reserved in said statement of claim.

Thereafter and within the time fixed by the said board of control, two hundred and four people claiming rights in and to the waters of said Silvies River, likewise filed statements of their claims in and to the waters of the said river with the said state board of control, and among the parties so filing said claims the defendants R. R. Sitz, Fred Otley and M. B. Hayes, Harney Valley Improvement Company, Silvies River Irrigation Company, and William Hanley Company, C. B. McConnell, Emory Cole and Leonard Cole, all filed their several statements of their claims in and to the waters of the said river, and its tributaries, and all of said defendants set forth in said claims their alleged right to take, appropriate and divert a large quantity of the waters of the said river above the land of complainant, and all of the said two hundred and four claimants and each of them set forth that they had taken appropriated and diverted, or had a right to take, appropriate, and divert a large quantity of water from the said river above the lands of said complainant.

That as a matter of fact the said state board of control took no testimony whatever as to the rights of the various parties to the waters of the said river at the times or places set forth in the said notice so published by the said state board of control, but the said state board of control at that time simply accepted and received ex parte written statements of claims of the various parties claiming rights in and to the waters of the said stream and the said board of control has construed the act of the legislature of the State of Oregon

to mean that at such time no evidence shall be taken by witnesses called and examined and cross-examined by the parties in interest at that time, but that the only evidence that will be received by the board at said time shall be the ex parte statements in writing as aforesaid; and the said board has adopted a rule that no other testimony will be taken or heard at said time and no testimony has been taken by the said board in said proceeding other than said ex parte statements of the claims of said parties.

Thereafter the said board of control gave notice of the time within which contests could be filed to the claims so filed as aforesaid, and within the time so fixed this complainant under protest and reserving all of the objections which it had made at the time of filing its statement of claim as aforesaid, filed contests to all of said claims so filed as aforesaid, alleging that the said parties have not appropriated any of the waters of the said Silvies River, that they had not appropriated the amount of water stated in their claim; that their only rights in and to the waters of the said river were as riparian owners; that whatever rights they had were subject to the rights of the Pacific Live Stock Company; that the rights of the said William Hanley Company, Harney Valley Improvement Company, and the Silvies River Irrigation Company were pending in said suits in the District Court of the United States for the District of Oregon, which suits were filed in abatement of said proceedings, and that there was no water that could be appropriated by said defendants Emory Cole, Leonard Cole and C. B. McConnell without serious injury to the rights of complainant.

Likewise within the time fixed by the said board of control, the following named claimants to the waters of said river, to wit: H. B. Simmons, J. P. Rector, Gustav A. Rembold, Henry Luig, Homer B. Mace and J. A. Eberle, William Southworth, Minnie Southworth, Webster Southworth, J. C. Oliver & Son (a copartnership), J. C. Oliver, Frank Oliver, Herman Oliver, Ira Sproul, David E. Helmick, G. E. Keller, Margaret Keller, Almons B. Guernsey, Lorenzo D. de Wolf,

Thomas F. Dunten, W. H. Lincoln, Walter Cross, Lawrence Shepherd, Nellie Hardesty, H. A. Dillard, J. C. Welcome, Jr., N. Brown, Ben Brown, Leon M. Brown, Allen Jones, Grant Thompson, J. C. Welcome, Sr., A. C. Welcome, E. P. Silvester, James Pirie, T. F. Matney, T. G. Houser, M. B. Hamesm, J. Lampshire, J. T. Barnes, J. H. Bunyard, H. J. Hansen, W. M. Stewart, R. R. Sitz, Blanch Sitz, J. T. Baker, D. M. Varien, F. O. Jackson, C. E. McPheters, Caliedonia Culp, Charles Walker, C. E. Parker, E. L. Swinney, J. L. Gault, J. M. Parker, Sam Mothershead, G. A. Rembold, W. A. Goodman, A. S. Swain, Lloyd Johnson, M. B. Holliday, C. B. Ausmus, Daniel Jordan, C. H. Leonard, Dave Craddock, George Craddock, John Craddock, Ben Craddock, William Bennett, Ida B. Bennett, A. Wintermeier, William E. Smith, Timothy Donovan, Joseph H. Hill and James H. Bunyard, all filed various and sundry separate contests against the various rights set up and claimed by the complainant, Pacific Live Stock Company, and denying and contesting the rights claimed by it and claiming rights superior to it.

Likewise within the time fixed by said board of control, the defendants Harney Valley Improvement Company and Silvies River Irrigation Company filed contests to the rights of the said Pacific Live Stock Company, denying the rights alleged and claimed by it, and setting up and claiming against it the same rights set up by the said companies in the said suit brought by the Pacific Live Stock Company against said companies, and now pending in the District Court of the United States for the District of Oregon.

Likewise, within the time fixed by the state board of control, the said defendants Emory Cole, Leonard Cole and C. B. McConnell filed contests to the claims of the said Pacific Live Stock Company, denying its rights and claiming the right to take, appropriate and divert a large quantity of the water of the said river above the lands of the said Pacific Live Stock Company.

Likewise, within the time fixed by the said state board of control, a large number of others of the said

claimants, filed additional contests to the claims set forth by various parties above named, other than the Pacific Live Stock Company herein.

That the said defendants constituting the state board of control claim the right to institute the proceeding herein alleged and referred to and claim the right to declare the rights of all parties in and to the waters of said river forfeited and lost who do not appear and file their statement of claims in accordance with the act creating the state board of control, and claim the right to allow and approve any claims filed by other parties which are not contested by any one claiming rights in or to the said river and claim the right to ascertain and adjudicate the rights of all parties in or to the said river and after such adjudication to actually take possession of the said stream, and all headgates and weirs in and upon the same, and to distribute the said water in accordance with its adjudication; in case any party having a claim to the said water does not appear to file his claim the said board of control would consider his right forfeited and would forcibly close his headgates, weirs and structures used for the diversion of water and would prevent him from taking or diverting any water of the said stream, and the said board has likewise adopted a rule that if any claim is filed which in fact is unfounded and "if such claim goes uncontested and a shortage occurs your headgate will be closed and the water allowed to flow down to satisfy such right which should in fact be subsequent"; that if the said complainant herein did not appear in the said proceeding and file its statement of claim the said board would have declared its rights forfeited, would have adjudicated and allowed it no water whatever, and after its adjudication or ascertainment the said board would have actually and forcibly used the power of the state to forcibly and actually deprive complainant of any water whatever, and to give, allot and distribute it to the other persons irrespective of the rights of complainant; that likewise if the said complainant had not contested the claims made by the said parties claiming waters

of the said river the said board would have allotted to them and adjudged to them the amounts so claimed by them and would have forcibly delivered the said water to them and forcibly taken the same away from complainant.

That although the said complainant was required by the provisions of the said act of the legislature of the State of Oregon to file its said statement of claim, on pain of forfeiting its rights, when said complainant sent the said statement of its claims to the said board of control for filing the said board refused to accept, receive or file the same unless the said plaintiff paid the said board a sum of money in excess of four hundred dollars and the said complainant, in order to file the same and prevent the said board from declaring a forfeiture of its rights, and in order to prevent the said board from using the power of the state to actually take and deprive complainant of its rights in and to the waters of the said river, the said complainant was compelled to, and did, under protest, involuntarily pay to the state board of control the said sum exceeding four hundred dollars in order to get the said board to file the said statement of claim as aforesaid, and the same was paid by complainant under protest then and there made in writing that the said demand was extortionate and deprived complainant of its property without due process of law, and deprived complainant of the equal protection of the law.

Complainant further alleges that the said state board of control now threatens to and will, unless restrained by the District Court of the United States for the District of Oregon, proceed to set a time and place for the hearing of all of the contests aforesaid and will proceed to compel the parties to produce evidence in support of said contests and in support of all of their rights in and to the waters of the said river alleged in the said contests and which contests do involve all the rights of all parties in and to all of the waters of the said Silvies River; that the said rights involve the diversion and use of water for a period exceeding

thirty (30) years, and by more than four hundred different people; that the state board of control has adopted a rule requiring the contestant in each contest to first produce his evidence in support of his grounds of contest and the said state board of control in said rule will require this complainant to affirmatively prove all of the allegations of its contests or will dismiss the same for lack of such proof and under its rules and regulations will require this complainant to affirmatively prove the amount of water appropriated and the date of appropriation of each of the parties numbering over two hundred which have been contested by complainant, and will likewise compel complainant to affirmatively establish all of its own rights in and to the waters of the said river covering a period of more than thirty years and initiated by numerous parties to whose rights complainant is successor; that the said Harney Valley, Silvies Valley and the said Silvies River are situated in one of the most inaccessible places in the United States, far removed from railroads, and reached only by stage, and the witnesses involved in said matter are largely scattered over the western states and the cost of finding, transporting and caring for witnesses to prove the rights of plaintiff alone would probably not be less than five thousand dollars; that the cost of subpoenaing, procuring, transporting and securing witnesses to prove the rights and the extent of the rights of the two hundred separate claimants to the waters of said river probably would not be less than five thousand, and probably would far exceed that amount, even if it would be possible to secure witnesses to negative the claims of said two hundred parties which burden has been cast upon contestant; that the cost of obtaining certified copies of the various deed, patents, muni-ments of title and records of the state land office and the United States land office showing the acquisition of title of plaintiff's land in order to show the riparian character thereof, and also to show the transfer of the rights initiated by other parties to complainant will not be less than one thousand dollars;

that the cost of obtaining certified copies of the proceedings in the various suits pending in the United States courts involving the rights of the various parties in and to the waters of said river, together with the testimony therein, would cost not less than two thousand dollars; that in order to meet the claim of said two hundred separate claimants in and to the waters of the said river, as well as to support the claims of complainant, it would be necessary to have elaborate surveys made of the entire territory covered by said irrigation, which surveys would cost not less than five thousand dollars; that in taking the testimony relating to the said matter and to the two hundred and fifty-nine separate contests which have been filed, the fees of reporting and transcribing said testimony, would not be less than ten thousand dollars; that beside the foregoing, complainant will be compelled to employ attorneys to conduct said contests and to attend upon the taking of evidence therein for probably a year or more, and in the preparation of the argument of said contests, and in arguing said matter to the said board, and the expense of such legal services would not be less than ten thousand dollars, and would probably greatly exceed that sum; that the total cost to the complainant of properly presenting its rights and contesting the rights claimed by others in case the said contest was proceeded with as aforesaid, would not be less than fifty thousand (50,000) dollars, and the amount of costs which the other parties to said proceeding might ultimately charge to complainant it is impossible for complainant to estimate, but it would probably exceed the sum of ten thousand dollars, and probably be greatly in excess thereof. (Fols. 10-18.)

JURISDICTIONAL QUESTIONS AND RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

The additional facts showing the jurisdiction of the district court and of this court on appeal and the rights of complainant under the constitution of the United States are alleged as follows:

“That the sole purpose of the aforesaid proceeding before the state board of control is for the purpose of obtaining and adjudicating that there is in the said Silvies River a quantity of water over and above the amount to which complainant is entitled which may be appropriated and diverted and taken away from the said river by the said Harney Valley Improvement Company, Silvies River Irrigation Company, Leonard Cole, Emory Cole and C. B. McConnell, and being the same matter involved in the said suits so pending in the federal courts as aforesaid, and the sole purpose of the said proceedings is to get an adjudication by the state board of control that there is surplus water over and above the rights of complainant which may be taken by the public and by the particular members of the public before mentioned, and the said adjudication is made entirely for the benefit of those seeking to take the water so claimed by complainant, and by other parties claiming to have rights in and to the waters of said river, and to allow the public to take and appropriate the same, and in the said act of the legislature of the State of Oregon the entire expense of the ascertainment, determination or adjudication of the said state board of control is thrown entirely upon the complainant and other persons claiming rights in and to the waters of said stream and unless the said complainant meets the demands of the said act and spends the money aforesaid it will be declared to have forfeited its rights and the said rights will be adjudicated to the said claimants other than complainant and the state board of control will use the power of said State of Oregon to forcibly take and allot the said water to such parties and to prevent the said complainant from thereafter taking or enjoying the use of any of the waters of the said stream;

That said act of the legislature of the State of Oregon and the said actions of the defendants herein taken tend to and do deprive the complainant of its property without due process of law in violation of the fourteenth amendment to the constitution of the United States, and deprive complainant of the equal protection of the law in violation of the fourteenth amendment to the constitution of the

United States, and deprive complainant of its property without due process of law in violation of the fifth amendment to the constitution of the United States;⁹ that if the said proceeding is not a judicial proceeding, but merely an administrative proceeding, complainant is compelled to expend said money simply for the purpose of preventing the state, without a judicial hearing in the tribunals provided by the constitution of the United States, or by any judicial proceeding, from forcibly taking possession of property of complainant, and still said adjudication or ascertainment will not be binding or conclusive either in favor of or against complainant, and can be disregarded by any party thereto, and in case the said proceeding and adjudication by the state board of control in such administrative proceeding should be thereafter certified in the courts of the State of Oregon and should be held to still remain an administrative proceeding in said courts, such adjudication will not be binding upon or against complainant and could not be relied upon by it in support of or to protect its rights, and if held thereafter to become a judicial proceeding, complainant would be entitled to have the same removed into the federal court, and in that event all of the testimony taken before the state board of control would be of no force, effect or virtue in the federal courts, and complainant would be entitled to not only have its rights determined by the said federal court, but likewise entitled to have the testimony respecting its rights taken under the sanction of law and under the rules and practice prevailing in said federal courts and all of the said expense in taking said evidence and proof would be lost to complainant.

That the defendants herein, other than the said board of control, threaten to and will, unless restrained and enjoined by the District Court of the United States for the District of Oregon, proceed to take testimony in the said proceeding, notwith-

⁹ The reference to the Fifth Amendment to the Constitution is in error, as that is only a limitation on the power of the Federal Government; but the same limitation on the state exists by virtue of the Fourteenth Amendment. (Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979.)

standing the prior jurisdiction of the District Court of the United States for the District of Oregon in the suits now pending therein, and above referred to, and notwithstanding the aforesaid proceeding for the removal of the said case into the District Court of the United States for the District of Oregon, and the other contestants mentioned in this complaint likewise threaten to and unless enjoined by the District Court of the United States for the District of Oregon, will proceed to hear and determine the said contests and to compel complainant to produce evidence in support thereof, and to hear the same; that the number of the said claimants is so large that it is impracticable, inconvenient and would be extremely expensive to make all of the said persons parties to this suit, but the parties named herein as plaintiffs and defendants fairly represent all classes of persons who are interested in the waters of the said river, and the said suit is brought against them not only personally but as representative of all of the parties claiming interests in and to the waters of the said river, and the said defendants are fairly representative of every class of claimants to the waters of the said river;

That all of the said claimants, other than complainant, in and to the waters of the said Silvies River, who have filed claims thereto as aforesaid, and whose rights have been contested or who have contested the rights of complainant, are citizens and residents of the State of Oregon, and were at all of the times herein mentioned, and none of them are citizens or residents of the State of California;

That the amount in dispute herein, to wit: the rights of the complainant in and to the waters of the said river, exceeds the sum of five thousand dollars, and the matter in dispute herein, to wit: the amount of property of which the said complainant will be deprived by the acts herein complained of, exceeds the sum of five thousand dollars;

That the complainant has no plain, speedy, adequate or other remedy in the ordinary course of law, and unless the said defendants are enjoined from the proceedings aforesaid, complainant will suffer great and irreparable injury, and will be deprived of its property without due process of law, its prop-

erty will be taken for a public use without just compensation, and it will be deprived of the equal protection of the law; that a large amount, to wit: many thousands of acres of land of complainant above described passed from the United States Government to the State of Oregon upon its admission to the Union as swamp land and as school land, and all of said lands were and are riparian to the said Silvies River and its tributaries, and have all of the rights in and to the waters of the said river belonging to such riparian lands and by virtue of such riparian lands and by virtue of such riparian right entitled to the use and benefit of the waters of the said river for irrigation, watering of stock and other purposes; said lands are entitled to all of the natural advantages growing out of said situation and location with respect to the flow of the said river, and all of said lands have, for more than thirty (30) years before the date hereof, passed from the State of Oregon to complainant, together with all of the riparian rights incident to the said lands, and that for more than thirty years complainant has so taken, diverted, used and enjoyed the waters of the said river so riparian to the said land and its right to so take and use the water vested in complainant long before the passage of the act of the State of Oregon creating the said state water board.

That on and upon other portions of the said lands the said complainant and its predecessors and grantors have for more than thirty (30) years last past taken, diverted, appropriated and used a large part of the waters of the said river for the irrigation of the said lands, and all the waters so appropriated by the said complainant, its predecessors and grantors was taken, diverted and appropriated long before the passage of the said act of the legislature of the State of Oregon, and all of said rights were vested property rights of the complainant long before the passage of the said act; that all of said rights so owned by complainant as a riparian owner and also all of said rights so owned by complainant as an appropriator as aforesaid were duly set forth in its claim in and to the waters of said river so filed by it with the state board of control as aforesaid, and all of said property rights of complainant

are being infringed upon, and will be infringed upon by the acts of the defendants as aforesaid." (Fols. 17-21.)

PARTIES AND RELIEF ASKED.

The parties defendant are: (1), the members of the state water board, made parties on the theory that they are an administrative and not a judicial body, and therefore not within the protection of Section 720 of the Revised Statutes; (2), the Silvies River Irrigation Company (a corporation), the Harney Valley Improvement Company (a corporation), and the William Hanley Company (a corporation), which were the parties defendant in the suits in the federal court which it is alleged will be interfered with by this proceeding; and, (3), R. R. Sitz, Fred Otley and M. B. Hayes, who instituted the adjudication proceeding, and C. B. McConnell, Emory Cole and Leonard Cole, for whose benefit it is alleged the proceeding is conducted; and the complainant also alleged that the number of the said claimants is so large that it is impracticable, inconvenient and would be extremely expensive to make all of the said persons parties to this suit, but the parties named herein as plaintiffs and defendants fairly represent all classes of persons who are interested in the waters of the said river and the said suit is brought against them not only personally but as representative of all of the parties claiming interests in and to the waters of the said river, and the said defendants are fairly representative of every class of claimants to the waters of the said river.

The prayer of the bill is as follows:

"Wherefore complainant prays that the said defendants and each of them, and also all of the parties who have filed claims and contests in the said matter of the adjudication of the waters of Silvies River, be enjoined and restrained from taking any further proceedings therein; that they be enjoined and restrained from proceeding with or hearing the said contests, or from making or attempting to make any adjudication of the rights of the complainant herein in and to the waters of the said river;

That they be enjoined and restrained from declaring any of the rights of complainant forfeited, or otherwise affected by the said proceeding; that they be enjoined from taking away or in any way interfering with any of the rights of complainant in and to the waters of said river by the proceeding aforesaid."

Position and Contentions of Appellant on This Appeal.

On this appeal and in this brief we shall maintain the following propositions.

I.

(a) Assuming that the proceeding for the determination of water rights provided by the act of 1909 is, as the United States District Court holds, merely an "administrative" proceeding, which can not finally determine vested rights, then the act is unconstitutional and deprives the complainant of its vested rights without due process of law, and deprives it of the equal protection of the law, and takes its property without compensation, all in violation of the fourteenth amendment to the Constitution of the United States, particularly because it compels complainant to come in and set up and have its rights determined on pain of forfeiting them, and, if it does come in, imposes upon complainant, first, the payment of certain sums as a condition of appearing and setting up its claims at all, and then compels it to pay all the expenses of the proceeding, admitted to amount to \$50,000, and if other persons file claims to water which conflict with its claims, such claims are adjudicated in that form as prior and superior to the rights of complainant, unless they are contested by complainant, and if contested, complainant is compelled to assume the burden of proof and *disprove* the existence of the rights claimed, and if it does not do so, such rights are allowed and the water allotted accordingly; and then the state water board is also made executioner as well as judge, and given power to actually and physically take the water and distribute it in

accordance with its "determination", which means that if the complainant refuses to submit to the exactions and fails to come in or to assume and discharge this burden, its water is entirely taken away; if it does come in but fails to contest conflicting claims, those claims are allowed and the water taken from complainant and given to the opposing claimants, and if it does contest such adverse claims, it must affirmatively *disprove* their existence and priority, and failing such proof the same are allowed in favor of the adverse claimants and the water allotted and physically delivered to such claimants as against complainant.

(b) That such a law deprives complainant of its property without due process of law, and deprives it of the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States, and, if it be claimed that such a law is for the benefit of the "public" in order to ascertain what water may still remain unappropriated and subject to the rights of the "public", it is unconstitutional for all these reasons, and also for the reason that it takes complainant's property, to wit: fifty thousand (\$50,000.00) dollars if it submit to the law and its water for twenty-six thousand (26,000) acres if it refuse to submit, for a public use, without compensation, which is equally a taking without due process of law; or if the proceeding and act is claimed to be (as is alleged in the complaint and admitted by the demurrer or motions to dismiss), for the *private* benefit of certain individual parties defendant herein who desire to appropriate such surplus water, the act is likewise unconstitutional as taking private property, viz: the money and water right of plaintiff, for a *private* use, which is equally a taking without due process of law in violation of the fourteenth amendment of the constitution of the United States.

II.

If, however, the act be held to provide a judicial proceeding for the determination of water rights, the *parties thereto* and defendants herein as distinguished from the

persons constituting the tribunal, should be enjoined from prosecuting the proceeding so as to interfere with prior suits pending in the federal courts between complainant and these same defendants, and involving the existence and extent of the same rights involved in such proceeding.

III.

If the proceeding authorized by the act of 1909 be held to be a judicial proceeding for the final and conclusive determination of water rights, then the same, being instituted by citizens and residents of Oregon against complainant, a citizen and resident of California, was removable to and actually removed into the United States District Court, and the legislature, by creating a new *form* of proceeding and a new *tribunal*, could not prevent such removal, and the defendants, having proceeded in disregard of the removal, to the great damage of complainant, this bill in equity will lie to restrain further proceedings by them.

IV.

The jurisdiction of the federal courts can not in any way be affected, abridged or defeated by state legislation prescribing new or different modes of procedure for the determination of civil rights, or creating special tribunals to determine such rights, or prescribing new forms of procedure for the ascertainment and determination thereof.

V.

A proceeding for the adjudication of relative water rights as between individuals is a judicial proceeding and is a case within the meaning of the federal statutes regarding the right of removal.

VI.

The controversy between the petitioners who instituted the adjudication proceeding and the Pacific Live Stock Company is a separable controversy which that company is entitled to remove into the federal court.

VII.

The mere fact that the legislature authorizes several suits to be brought in the same proceeding cannot affect the right of removal.

What Appellant Does NOT Claim.

Lest there be any misunderstanding as to the position of appellant, we desire to state that we do not dispute the fact that every one holds his property subject to the condition that his title may be attacked in the regular constituted tribunals having jurisdiction to try the title thereto and give final relief to the parties, nor do we dispute the right of the state to create a special judicial tribunal to determine such rights; nor do we dispute the right of the state to provide a special form of proceeding having the characteristics of due process of law for their determination; nor do we deny that any reasonable form of notice thereof may be provided; nor would we question the entire constitutionality of the act of 1909 if it created such a proceeding and such a tribunal; but we do claim that the citizen cannot be haled before an administrative body in an administrative proceeding, before which and in which his rights cannot be legally determined and forced to establish his rights, at his own expense, on pain of forfeiture, nor can the state provide for the forcible physical taking of the citizen's property by the officials of the state as the result of any "determination" or "ascertainment" which may be made by such a body. On the other hand, if the legislature does create a tribunal and a proceeding judicial in their nature, and having full authority to determine the rights of the citizen, it cannot thereby interfere with pending suits in the federal court involving such rights, nor can it deprive the citizen of the right of resort or removal to the federal court where the requisite diversity of citizenship exists.

Assignment of Errors.

1. The court erred in sustaining and allowing the several motions of the defendants to dismiss the said suit and to dismiss the said bill of complaint.

2. The court erred in holding that the said bill of complaint did not state facts sufficient to constitute a cause of suit in favor of complainant and against defendants.

3. The court erred in holding that the proceeding referred to in said bill of complaint had not been removed into the District Court of the United States for the District of Oregon.

4. The court erred in refusing to protect its prior jurisdiction in the cases pending in said court and referred to in said bill of complaint.

5. The court erred in holding that the acts alleged in said complaint do not deprive complainant of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

6. The court erred in holding that the proceedings alleged in said complaint did not deprive complainant of the equal protection of the law guaranteed to it by the fourteenth amendment to the Constitution of the United States.

7. The court erred in holding that the acts alleged in said complaint did not constitute the taking of complainant's property for a public use without compensation in violation of the fourteenth amendment to the Constitution of the United States.

I.

IF IT BE HELD THAT THE PROCEEDING TO DETERMINE WATER RIGHTS IS MERELY AN "ADMINISTRATIVE" PROCEEDING, WITH NO POWER TO FINALLY JUDICIALLY DETERMINE VESTED RIGHTS, THEN, SO FAR AS IT ATTEMPTS TO AFFECT VESTED RIGHTS, IT AMOUNTS TO AN UNCONSTITUTIONAL INTERFERENCE WITH PROPERTY RIGHTS, AND DEPRIVES THE PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND TAKES PLAINTIFF'S PROPERTY FOR A PUBLIC OR PRIVATE USE WITHOUT COMPENSATION.

As we have already indicated, it must be taken as fundamental that every person owns and holds property subject to the condition that anyone may attack his title thereto in the regularly constituted tribunals having authority and jurisdiction to pass on such title, and he also holds it protected by the correlative assurance that if attacked in such tribunal he may obtain a final judicial determination as to his ownership of the property, or may himself resort to such tribunal to have his title thereto forever quieted against any unwarranted claim that may be made against him. But while this is freely conceded, we most earnestly deny that the owner of property can be compelled, on pain of forfeiting his property, to appear before an administrative board having no authority to finally or judicially determine his rights to such property, and at his own expense establish and prove his rights thereto and disprove the adverse claims made thereto by other parties. In support of this general contention, we submit the following considerations and judicial decisions for the consideration of the court.

(a) A water right by appropriation or by virtue of riparian ownership is a vested right of property as much as the land on which it is enjoyed or of which it is a part.

San Joaquin & Kings River Canal & Irrigation Company v. Stanislaus County, 233 U. S. 454; 34 Sup. Ct. Rep. 652; 58 L. ed. 1041;

Palmer v. Railroad Commission of the State of California, 167 Cal. 163; 138 Pac. 997.

(b) If such a taking of property be deemed a taking for a public use, then it is taken without compensation, and the taking of private property for public use without compensation is equivalent to a taking of property without due process of law.

Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226; 41 L. ed. 979.

(c) If such taking be considered as for the private benefit of other appropriators, then the taking of private property for a private use is equally in violation of the due process provision of the Constitution.

Davidson v. Board of Administrators of New Orleans, 96 U. S. 97; 24 L. ed. 616.)

(d) Even when the state desires to take the property of an individual for public use, and proceeds to do so by the ordinary process of eminent domain, the owner cannot be made to bear any portion of the expense incident to such proceeding, either in the trial court or in any appellate court to which the proceeding may be taken by either side.

San Diego L. & T. Co. v. Neale, 88 Cal. 50, 67; 25 Pac. 977; 11 L. R. A. 604;

San Francisco v. Collins, 98 Cal. 259, 263; 33 Pac. 56.

(dd) One of the essentials of "due process of law" is the existence of a tribunal having jurisdiction to decide the matter in issue. As was said in

Carr v. Brown (R. I.), 38 Atl. 9:

"Those rules require that there shall be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding, and that there shall be a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated."

In *Chicago etc. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, this court stated one of the essentials of due process of law to be a "court having jurisdiction of the subject-matter."

In *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct., 14, Mr. Justice Moody said:

“Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction. *Pennoy v. Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236.”

(e) The distinction between requiring one to submit his rights to a special tribunal having jurisdiction and authority to make a final and binding adjudication as to the rights of property, and requiring the submission of the same to a mere ministerial board having no such authority, has been clearly and emphatically recognized by this court.

In the case of *United States v. Throckmorton*, 4 Sawyer 42, Federal Case No. 15,121, Mr. Justice Field, on circuit, had occasion to consider the validity and effect of the act of Congress creating a board of land commissioners for the settlement of land titles in California under the treaty with Mexico. In holding that it was competent for Congress to create a special tribunal for the determination of such rights, and that the same was valid because of the fact that the tribunal was vested with judicial power to make a binding and conclusive determination of the subject-matter, and that the duty of everyone to submit his title to such tribunal was compensated by such final determination, whereas such duty would be onerous and oppressive if such tribunal did not have authority to make a binding determination, Mr. Justice Field used the following language:

“By the act of March 3, 1851, the legislative department prescribed the mode in which the provisions of the treaty should be carried out and the obligations of the government to the former inhabitants discharged, so far as their rights respected the territory acquired; and thus provided the means of separating their property from the public domain. That act created a commission of three persons to be appointed by the president, by

and with the advice and consent of the senate, for the express purpose of ascertaining and settling private land claims in the state. It gave a secretary to the commission, skilled in the Spanish and English languages, to act as interpreter and to keep a record of its proceedings. It provided an agent, learned in the law and skilled in those languages, to superintend the interests of the United States, and it was made his duty to attend the meetings of the commissioners, to collect testimony on behalf of the United States, and to be present on all occasions when the claimant, in any case, took depositions. To the commission, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required, on pain of forfeiting his land, to present his claim, together with the documentary evidence and testimony upon which he relied in its support. The commissioners, while sitting as a board, and at their chambers, were authorized to administer oaths and take depositions in any case pending before them. The testimony was to be reduced to writing and recorded in books provided for that purpose. The commissioners were obliged to hear every case, and decide upon the validity of the claim, and within thirty days after their decision, to certify the same, with the reasons on which it was founded, to the district attorney of the district. The act provided also for a review of the decision of the commissioners, upon petition of the claimant or the district attorney, setting forth the grounds upon which the validity or invalidity of the claim was asserted. To the petition an answer was required from the contestant, whether claimant or the United States. Subsequently, in August, 1852, the act was changed in this particular, and, when a decision was rendered by the commissioners, they were required to prepare two certified transcripts of their proceedings and decisions, and of the papers and evidence upon which the same were founded, one of which was to be transmitted to the attorney-general, and the other filed with the clerk of the district court, and the filing operated as an appeal on behalf of the party against whom the decision was rendered. In case the decision was

against the United States, the attorney-general within six months after receiving the transcript, was required to cause a notice to be filed with the clerk that the appeal would be prosecuted, or it was to be regarded as dismissed.

"Upon the review by the district court upon the petition or appeal, not merely the evidence before the commissioners was considered, but further evidence could be taken by either the claimant or the government; so that, in fact, the whole matter was heard anew, as upon an original proceeding. From its decision, an appeal lay to the Supreme Court of the United States.

"As thus seen, the most ample powers were vested in the commissioners and the district court to inquire into the merits of every claim; and they were not restricted in their deliberations by any narrow rules of procedure or technical rules of evidence, but could take into consideration the principles of public law and of equity in their broadest sense. When the claim was finally confirmed, the act provided for its survey and location, and the issue of a patent to the claimant. *The decrees and the patents were intended to be final and conclusive of the rights of the parties, as between them and the United States.* The act, in declaring that they should only be conclusive between the United States and the claimants, did, in fact, declare, that as between them they should have that character.

"Here, then, we have a special tribunal, established for the express purpose of ascertaining and passing upon private claims to land derived from Spanish or Mexican authorities, clothed with ample powers to investigate the subject and determine the validity of every claim, and the propriety of its recognition by the government, capable as any court could possibly be made of detecting frauds connected with the claim, and whose first inquiry in every case was necessarily as to the authenticity and genuineness of the documents upon which the claim was founded.

"We have a special jurisdiction of a like nature in the district court to review the decision made by the commissioner, and investigate anew the claim. We have principles prescribed for the government

of both commission and court in these cases, and of the supreme court, upon appeal from their decisions, not applicable in ordinary proceedings, either at law or in equity, and as already stated, every person claiming land in the state was required to present his claim for investigation. *The onerous duty thus thrown upon him was relieved of its oppressive character by the accompanying assurance, that, when his claim was adjudged valid, the adjudication should be final and conclusive.*"

This same matter came before this court in the case of *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, and in upholding the validity of the same legislation, this court used the following language:

"The order of the commissioners or the decree of the court established as between the United States and the private citizen, the validity or the invalidity of such claims, and enabled the Government of the United States, out of all its vast domain, to say, 'This is my property', and also enabled the claimant under the Mexican Government who had a just claim, whether legal or equitable, to say, 'This is mine'. This was the purpose of the statute.

* * *

Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called *into a court of justice* to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government,

in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before *the proper tribunals* to sustain them."

(f) Following the same course of reasoning, it has been held that the owner of a vested water right cannot be held liable for the expenses of a mere administrative proceeding for the purpose of ascertaining the extent and existence of his rights. This was directly held by the Supreme Court of South Dakota, passing upon the water law of that state, in the case of *St. Germain Irrigation Company v. Hawthorn Ditch Company*, 32 S. D. 260; 143 N. W. 124. In so holding, the court said:

"(1) Section 1 of this act provides as follows: 'All the waters within the limits of the state from all sources of water supply belong to the public and, except as to navigable waters, are subject to appropriation for beneficial use.'—and section 19 provides that, before any person shall use any of such water for beneficial use, application must be made to the state engineer for a permit to appropriate the same; and section 10 provides that the applicant for such permit shall pay certain fees, which in no case would amount to less than \$7. The provisions of these sections, in so far as they relate to or interfere with certain vested property rights, are clearly in conflict with section 2, art. 6, Const., providing that 'no person shall be deprived of life, liberty or property without due process of law', and also are in conflict with section 13, art. 6, providing that private property shall not be taken for public use without just compensation.

(2) 'Every person, through whose land a natural water course runs, has a right, *publica juris*, to the benefit of it for all useful purposes to which it may be applied, and no proprietor of land, on the same water course, either below or above has a right to unreasonably divert it from flowing upon and onto his premises or to obstruct it in passing from them or to corrupt or destroy it. This riparian right is inseparably annexed to the soil, not as an easement nor as an appurtenance, but as a part and parcel of the land itself. Use does not create it,

and disuse cannot destroy or suspend it.' *Johnson v. Jordan*, 2 Metc. (Mass.) 239, 37 Am. Dec. 85; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659; *Shamleffer v. Council Mill Co.*, 18 Kan. 24; *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Scriver v. Smith*, 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224; *Whitney v. Wheeler Mill Co.*, 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; *Duckworth v. Water Co.*, 150 Cal. 520, 89 Pac. 338; *Turner v. James Canal Co.*, 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, and note; *Redwater Canal Co. v. Jones*, 27 S. D. 194, 130 N. W. 85; *Redwater Canal Co. v. Reed*, 26 S. D. 466, 128 N. W. 703; *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. D. 519, 91 N. W. 352; *Stenger v. Tharp*, 17 S. D. 13, 94 N. W. 402. The right of a riparian owner to make a reasonable beneficial use of the waters of a flowing stream for domestic and irrigation purposes is a vested property right and is entitled to protection to the same extent as property rights generally. It is within the purview of a constitutional provision prohibiting the taking of property for public use without compensation. *McCook Irrigation Co. v. Crews*, 70 Neb. 109, 96 N. W. 996; *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. Vested property rights in waters in this state, whether held as riparian or by prior appropriation, could not thus be taken or confiscated or interfered with by any such act of the Legislature.

(3) The private owner of real estate, who sinks an artesian well on his premises, is the absolute owner of the water flowing therefrom and may control the whole thereof as he may see fit so long as he does no injury thereby to others; the private owner of real estate who constructs an artificial reservoir on his premises, in which he collects and retains surface waters wholly on his own premises, is the absolute owner thereof and may use and control the whole thereof as he may see fit so long as he does no injury thereby to others. The right to use such waters can not be

thus confiscated or interfered with by the state or the public and placed in the custody or control of a state engineer any more than could the land itself upon which such water happened to be. The rightful owners of riparian lands can not be thus deprived of or made to pay for a permit to use what under the law rightfully belongs to them. If the provisions of this statute were to be enforced according to its terms, the owner of a large farm could not sink an artesian well or even dig an ordinary well thereon for the purposes of domestic use without first obtaining and paying for a permit to do so. In a certain limited sense water flowing in a natural stream belongs to the public, but the right to the use thereof is the subject of private property and ownership by riparian owners or others who have lawfully appropriated the same, but the use thereof may be regulated by law and by the courts, to the end that each rightful user and appropriator may acquire no more thereof than his fair and equitable share.

It is contended by respondents that section 19 is unconstitutional and void on the ground that it interferes with the free use of private property by the owner thereof. We are of the opinion that, in so far as the vested property rights in and to the use of water is concerned, this section of the statute is void. The private owners of artesian wells and artesian reservoirs and ponds and riparian owners and other lawful appropriators having a vested right to appropriate and use certain waters cannot be required to pay for and secure a permit to use that to which they have a vested right. The constitutionality of a law is to be determined from what may be done thereunder, not from what has or is being done thereunder. *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169, 116 Am. St. Rep. 994. There may be streams and other bodies of water in this state containing a surplus over and above what might be legally used by riparian owners and other lawful appropriators, which might be the subject of permit under the provisions of this statute.

(4) It is also contended that section 46 of the act in question, which provides that, when a party

entitled to the use of water fails to beneficially use all or any portion of the waters claimed by him for a period of three years, such unused waters shall revert to the public, is void for the same reasons. We are of the opinion that this section is void as to a riparian owner but valid as to one who is no more than an appropriator without riparian right. A riparian right to use such waters of a flowing stream can not be lost by disuse.

(5) It is also contended that section 16 is void as tending to deprive individuals of property rights and property, by way of costs and expenses, without due process of law. We are also of the opinion that this contention is well taken. This section among other things provides that, when a suit to determine water rights has been filed, the court shall by order direct the state engineer to make a complete hydrographic survey of said stream system, and that the costs and expenses thereof be apportioned pro rata among all the parties taking waters from said stream in proportion to the amount of water allotted to each. It is a matter of common knowledge that there are many streams in this state, including the stream in question, where it would take many thousands of dollars to make such a survey. A riparian or other lawful appropriator lawfully using no more of the waters of said stream than justly entitled to could not be required without his consent to pay any portion of such expense without being deprived of his property without due process of law. Simply the filing of such a unit is not sufficient authority to so deprive him of his property. Such a procedure could only result in a fat benefit to some civil engineer."

(g) The immunity of the owner of a vested right in water from the acts of the state engineer under the water law of the State of Nevada has been recently passed upon by the Supreme Court of the State of Nevada in the case of *Knox v. Kearney*, 37 Nev. 393, 142 Pac. 526. In that case the legislature of the State of Nevada had passed an act providing in substance the same as the Oregon act for a proceeding before the state engineer for the determination of water rights,

and requiring all claimants to appear in such proceeding and to set up and establish their rights on pain of forfeiting the same. Knox, the owner of a vested water right, brought his bill in equity against the state engineer, alleging the ownership of such right and the threatened interference therewith by the state engineer pursuant to the provisions of that act. In fact, his complaint was, in all substantial particulars, the same as the bill of complaint here under review. In holding that the complaint stated a cause of action and entitled the plaintiff to the injunction, the court said:

“By the allegations of section 4 of the complaint the diversion and application to beneficial use is declared to have been consummated on or about the year 1890, and it is specifically alleged that at the time of said appropriation no other person or persons had acquired any right to the waters thus appropriated and in use. These specific allegations, constituting the *fundamentals of vested rights*, are sufficient in themselves, if supported by evidence, and in the absence of preponderance of proof to the contrary, to warrant the judgment of a court of competent jurisdiction in decreeing a vested right.

By sections 6 and 7 of the complaint the allegations of specific interference with a vested right is set forth.

* * * *

It is not shown that there are any adjudications decreeing vested water rights in the Muddy River district, nor do these plaintiffs seek to establish their right against the defendant by reason of any decree or adjudication. Moreover, if any determination had prior thereto been made by the state engineer as to water rights in the Muddy River district, *they would not be such as would preclude the plaintiffs in this case from filing their action under the allegations therein set forth and securing a temporary injunction from an act of the engineer which might unjustly deprive them of the vested rights.* An action of this nature is the only means of redress available to plaintiffs to protect them from unreasonable or unjust acts on

the part of the state engineer or the water commissioners, * * *

As was said by the Supreme Court of Oklahoma in the case of Board of Education v. Boyer, the law presumes the validity and regularity of the official acts of public officers within the line of their official duty, as it does the regularity of the acts of private persons and this presumption obtains until overcome by proofs, as to all acts involving the performance of ministerial or administrative duties, *except in a case where it is sought to take away personal rights of a citizen or deprive him of his property or place a charge or lien thereon.*

The complaint sets forth a prior vested right and an interference with that right. It also sets forth the injury attendant upon the interference. This, of itself, in our judgment, was sufficient to warrant the court in denying the motion to set aside the injunction and overruling the demurrer."

The same matter was considered more elaborately by the Supreme Court of Nevada, in the case of *Anderson v. Kearney*, 37 Nev. 314, 142 Pac. 803. In that case, it appeared that the legislature of the State of Nevada had enacted a water law providing for the determination of water rights in a proceeding before the state engineer; all persons were required to appear and present their claims, and it was provided that if they did not do so, they would be forfeited. The act also provided that from the determination of the state engineer an appeal might be taken to the supreme court of the state. Such a proceeding having been instituted, the plaintiffs, being the owners of vested water rights, filed their bill of complaint for an injunction against the state engineer, enjoining him from in any way interfering with their vested property rights. The lower court granted the injunction prayed for, enjoining the prosecution of the proceeding at all. On appeal, two of the justices of the court held that he should be enjoined from in any way interfering with the vested rights of the plaintiffs, and the third justice held that he should be entirely enjoined from taking any proceeding under

the act. In reaching these conclusions, three separate opinions were written by the three justices of the court. The prevailing opinion was written by Mr. Justice Norcross, and took the position that the act should be construed and held to be merely administrative and the adjudication not binding on the court. It will be noted that this was the same construction given to the Oregon law by the United States District Court in the case at bar. As a result, however, of this conclusion, the prevailing opinion of Mr. Justice Norcross held that the state engineer should be enjoined from in any way affecting vested rights, the language used being as follows:

“The district court is directed to modify the temporary injunction so as to only *restrain the state engineer from making determinations which would in any way impair vested rights.*”

Chief Justice Talbot, in concurring in this determination, filed a separate opinion in which he said:

“It is well settled that the state may inspect, regulate and exercise a superintending control over various kinds of business and property. Statutes regulating the hours of labor in underground mines and in smelters, quartz mines and ore-reduction plants have been sustained. Laws providing for factory inspectors and for safety appliances in mines and factories and on railroads, and regulating transportation of passengers, freight and live stock are no longer questioned. Statutes regarding headlights, safety couplers and train crews are illustrations. Laws providing that payment for the mining of coal should be made upon the basis of weight after it has been screened have been sustained by the Supreme Court of the United States. Other statutes forbid the polluting of streams, running of water upon highways, and the speeding of automobiles. For administrative purposes, bank, railroad and public service commissions may often act judicially and investigate, have hearings and determine facts to guide them for the purpose of fixing rates and exercising their control, but their determinations are not conclusive against the adjudication of the courts.

It has now come to be generally recognized that under our free government, with all its constitutional guarantees, statutes passed for the public benefit, to meet the new conditions which arise, will be sustained and enforced, although they affect private property or limit the right of contract. As in these arid regions water is most essential for the support of agriculture, one of the greatest industries of the commonwealth, and by reason of its nature the regulation of its use and the limitation of appropriators to the amount to which they are entitled and need for beneficial purposes is of prime importance, no good reason is apparent why the people's representatives in the legislature assembled may not in behalf of the public welfare pass laws to regulate its use, as is done in other inter-mountain states and with other property and business pursuits.

To this end the state engineer may proceed in the manner directed by the statute to obtain the best evidence to be had, whether judgment, documentary or oral, and to carefully and accurately determine the relative rights of water-users. Any valid judgments previously rendered regarding these rights are binding upon him as well as upon the courts. Can his determinations have the force of final adjudications? It is provided by the constitution:

‘ARTICLE 6.

Judicial Department.

‘Section 1. The judicial power of this state shall be vested in a Supreme Court, District Courts, and in Justices of the Peace. The Legislature may also establish courts, for municipal purposes only, in incorporated cities and towns.’

Section 44 of the water law provides:

‘The final orders or decrees of the state engineer in the proceedings provided by law for the adjudication and determination of rights to the use of the waters in this state, shall be conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication, subject, however, to the provisions of law for appeals, rehear-

ings and for the reopening of the orders or decrees therein.'

By this section it is attempted to make the determination of the state engineer a final adjudication if there is no rehearing or appeal, but it is not apparent that the constitution will allow it to have that effect; for if such determination could be a conclusive adjudication as the statute states, even if there is no rehearing or appeal, it would in effect be giving the force of a judgment to the determination of the state engineer and have the effect of conferring judicial power upon him, something the constitution does not permit when it provides that the judicial power of the state shall be vested in the supreme court, district courts and justices of the peace, and courts established for municipal purposes only. With the judicial power of the state limited by the constitution to these courts, the judges of which are required by the constitution to be elected, it would seem that the legislature can not invest the state engineer, or any appointive or administrative officer, with the judicial power of finally adjudicating vested rights to water. If the legislature could give the state engineer power to make final adjudications of water rights, it could authorize him, or some other appointive officer, to make final adjudications of the right to mines, lands and other property and claims, and divest the courts of the jurisdiction given them by the constitution, or if appeal be nominally allowed to the courts, hedge it about with such expensive and burdensome restrictions as to place it beyond the reach of ordinary litigants.

As the constitution limits the judicial power in this state to the supreme, district, justice, city and municipal courts, it follows that it does not provide for an appeal to the district court from the decision of any tribunal not mentioned in that document. The fact that the statute provides for an appeal can not make the determination of the state engineer binding as a final adjudication of water rights or endow him with judicial power to make a final determination of rights, when the constitution directly limits that power to the courts specified. The constitution of the United States provides that 'the

judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' (Art. 3, sec. 1.) If there were a provision in the state constitution authorizing the legislature to establish other courts at its discretion, and provision had been made by statute for a special tribunal to determine the rights of water-users, a very different question might be presented. Various provisions in relation to courts are found in the organic acts of different states. Upon the adoption of our state constitution probate courts which were permitted under the territorial government were no longer allowed, and the jurisdiction they exercised was transferred to the district court. Decisions in Wyoming and other states having different constitutional and statutory specifications can have but little bearing upon this question."

Mr. Justice McCarran filed what is in form a dissenting opinion, but not because he dissented from the injunction that was issued, but because he was of the opinion that the injunction should have been much broader and should have enjoined the state engineer from taking any proceedings in the matter, for the reason that, in his opinion, the construction of the law which made the determination administrative was incorrect, and that the powers were in fact judicial, and could only be conferred upon an officer authorized by the constitution to discharge judicial functions. As we are here considering this act on the theory of the decision of the district court that the proceeding is administrative and not judicial, we will postpone a consideration of the very interesting opinion of Mr. Justice McCarran on this subject until a later part of this brief.

As a result of these opinions, the District Court of the State of Nevada entered a modified injunction against the state engineer as follows:

"NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant, W. M. Kearney, as State Engineer, and his agents, servants, employees and all persons acting under or by the authority of said defendant, as State Engineer, be, and they hereby are, and each

of them is, enjoined;—a. from in any manner making any determination as to the date of priority, extent or purpose, of the rights to or appropriations of the plaintiffs, or any of plaintiffs, or of the rights to or appropriations of any other claimants, in or to the waters of said Humboldt River or its tributaries, which said rights to or appropriations of the waters, of said Humboldt River or its tributaries, were initiated and perfected prior to the approval of the water law of Nevada, approved March 22, 1913; b. and, from entering or causing to be entered of record in the office of the State Engineer an order, or any order, determining the rights of plaintiffs, or any of plaintiffs, or any of the appropriators of water from the Humboldt River or its tributaries, which said rights or appropriations were initiated and perfected prior to March 22, 1913; c. and, from issuing or causing to be issued, to any appropriator of or claimant to any of the waters of said Humboldt River or its tributaries, the certificate, referred to in Sec. 51 of the said water law of Nevada, approved March 22, 1913; d. and, from making any determination or order that proof of appropriation must be filed within any fixed time, or from refusing to receive and file at any time, within office hours, proof of appropriation of water from the Humboldt River or its tributaries, when the said proof of appropriation of water is in form and accompanied by the proper fee therefor, as provided by law; e. and, from making any determination, as to or concerning the rights to or appropriations of the plaintiffs or any other claimants in or to the waters of said Humboldt River or its tributaries, which said rights to or appropriations of the waters of said Humboldt River or its tributaries were initiated and perfected prior to the approval of the water law of Nevada, approved March 22, 1913, which would in any way impair vested rights.”

(h) The opinion of the United States District Court, in sustaining the demurrer to the bill of complaint in the case at bar, will be found reported in 217 Fed. 95, and in justifying its action in that regard, used the following language:

"It is claimed that, since the statute provides that any party who fails to appear after notice and submit to the water board proof of his claim shall be barred from subsequently asserting any rights thereafter acquired, the provision requiring him to pay a fee for so doing is in effect depriving him of his property without due process of law. It is not necessary for us to determine that question in this case. The bill of complaint shows that the complainant has paid the required fee and filed its claim before the board, and therefore is not being deprived of any right it may have to the waters of the stream. The other probable expenses referred to in the bill, such as attorney's fees and cost of procuring evidence on behalf of the complainant, are not required by the statute to be paid or incurred, but are within the control of the complainant, *and as such may be incident to any proceedings in which it deems its interests are involved.*"

It will be noted that in reaching this conclusion the court took the position that it was entirely optional with the complainant as the owner of vested water rights, whether or not it would appear and prove and establish its rights, and defeat and disprove adverse rights which might be claimed; that the case was therefore analogous to any purely administrative proceeding in which a person may voluntarily appear, if he feels that his interest will be subserved by doing so, and, consequently, he cannot complain of any restrictions which may be placed upon his exercise of that privilege.

This conclusion would be irresistible if it was in any way supported by the act in question; but, as we have pointed out, the act in question requires all persons holding or claiming such rights to appear; provides that if they fail to do so, their rights shall be deemed forfeited and abandoned; provides that the determination of the board shall be final and conclusive as to such rights, and provides that the state engineer shall thereupon physically take possession of the water of the stream and physically allot and deliver it in accordance with such determination.

It is alleged in the bill and admitted by the demurrer, that this will be done, and it is to prevent this interference with and infringement upon the property rights of plaintiff that the bill is brought.

Of course, it is no answer to the bill to say that the act of the legislature is unconstitutional and void, and that the state through its officials cannot legally do what the legislature of the state has directed them to do. The bill is brought to enjoin an unconstitutional interference with complainant's rights of property, with an ample showing of irreparable injury, and such a complaint is based upon the illegality of the threatened acts, and therefore an admission of their illegality is the basis of the complaint and cannot be relied on in defense thereto. This of course is not and cannot be disputed. The only question, therefore, is one of statutory interpretation, and as to whether the state, by the act in question, has purported to provide that the owner of a vested right must appear, and that if he fails to do so his rights will be declared forfeited, and that forfeiture enforced by the power of the state.

A mere reading of the act, it seems to us, is a conclusive answer to the erroneous assumption of the Honorable District Court that it is purely optional with the owner of a vested right whether he will or will not appear and establish his claims. Such an impression must have been gathered from some source, in the nature of brief or argument in the case, rather than from a reading of the statute itself, which we have set out in this brief. But however that may be, since the decision of the district court, the act has been interpreted in this particular by the Supreme Court of the State of Oregon, in the case of *Pacific Live Stock Company v. Cochran*, 73 Ore. 417; 144 Pac. 668. That was an action at law commenced in the state court of the State of Oregon by the Pacific Live Stock Company, complainant herein, against George T. Cochran, superintendent of Water Division Number One, for the purpose of recovering from him the sum of four hundred one dollars and forty-four cents, paid to him under protest and compulsion, and which was demanded by him as a condition to per-

mitting the complainant to appear in the adjudication proceeding and file its claims. In that case the trial court, in holding that the same could not be recovered, took the same position that was taken by the district court in the case at bar, viz: that its appearance was optional and voluntary. In reaching that conclusion, it said:

"It is alleged in the complaint that the money paid was paid under compulsion. However, I think that the complaint clearly shows that the only compulsion was the provisions of the water code requiring the same to be paid. Of course, it was optional with the plaintiff whether it paid the money or not; that is, it was optional with the plaintiff whether it filed its claim, but if it did not file its claim, under the law its right to have the water it was entitled to have adjudicated ceased, and it could not afterwards have its right adjudicated. * * * Furthermore it is optional with the land owner or the owner of the water right, whether he has his water right adjudicated or not."

In passing upon the correctness of this decision, on appeal the Supreme Court of the State of Oregon, in the case above referred to, used the following language:

"We cannot agree with the statement of the learned judge that it is optional with the land owner to have his water rights adjudicated. Section 6656 provides: 'Any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceeding, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him.' It is evident that a failure by the claimant of a water right to appear and submit his claims when properly required to do so bars his right to assert it thereafter to the same extent that a party is barred who makes default after service of summons in a proceeding at law."

It will be seen from this that the demurrer to the bill of complaint in the case at bar was sustained by the honorable District Court of the United States for the

District of Oregon, on the ground and on the assumption that it was entirely optional with the plaintiff whether it would or would not appear in the adjudication proceeding, while the Supreme Court of Oregon has now held that as a matter of fact it is not optional, but that, on the contrary, if the owner of a vested right of property fails to appear in that proceeding, it is the intention of the act of the legislature that he shall forfeit his rights in the same manner and to the same extent as if he had suffered a default in any action in which a regular summons might be served upon him.

(i) Of course it is well settled that a decision of the highest court of a state construing an act of the legislature of the state is binding and conclusive in the federal courts.

See

Note to *Forepaugh v. Del. etc. R. Co.*, 5 L. R. A. 508;

Esty's Fed. Procedure, 9th ed., pages 808 et seq.

It therefore results that the entire basis of the decision in the case at bar has been destroyed, and it now stands as settled law that the legislature has attempted to require a person having a vested right of property to appear before an administrative body having no power to make a final determination as to the rights of the parties, and at the same time has provided for the forfeiture of such rights in case they are not presented and proved, and at the same time required the owner of such right to pay certain amounts as a condition of appearing at all, and requires such owner to pay all of the expense of proving such rights, and all the expense of disproving any rights which may be urged in hostility to such rights, and provides for the physical taking away of its property in order to satisfy an administrative determination of a ministerial officer as to the existence and extent of such rights.

We most earnestly submit that no authority can be found to support such an invasion of the right of property.

II.

IF THE PROCEEDING TO ADJUDICATE WATER RIGHTS BE HELD TO BE A JUDICIAL PROCEEDING FOR THE FINAL DETERMINATION OF WATER RIGHTS, THE FEDERAL COURT HAVING ACQUIRED JURISDICTION OVER THE SUBJECT-MATTER, AS BETWEEN THE COMPLAINANT AND THE DEFENDANTS THE WILLIAM HANLEY COMPANY, THE SILVIES RIVER IRRIGATION COMPANY AND HARNEY VALLEY IMPROVEMENT COMPANY BEFORE SUCH PROCEEDING WAS INSTITUTED, THAT COURT SHOULD RETAIN THAT JURISDICTION TO THE END AND SHOULD ENJOIN THE DEFENDANTS FROM PROSECUTING THE PROCEEDING IN THE STATE TRIBUNAL IN SUCH A MANNER AS TO INTEREFERE WITH THE PRIOR JURISDICTION OF THE FEDERAL COURT, AND THE BILL OF COMPLAINT HEREIN SHOULD HAVE BEEN SUSTAINED FOR THE PURPOSE OF PROTECTING THAT JURISDICTION AND GIVING THAT RELIEF.

The general proposition that where the federal court has acquired jurisdiction of a particular controversy, involving property rights within its jurisdiction, it will maintain that jursdiction to the end and may enjoin the parties thereto from prosecuting litigation involving the same subject-matter in the state courts in proceedings subsequently brought therein, is so well established that it will be unnecessary to do more than refer to the following authorities in support thereof:

- Taylor v. Taintor*, 16 Wall. 366, 370;
- Harkrader v. Wadley*, 172 U. S. 148, 164 (1898);
- Proutt v. Starr*, 188 U. S. 537, 544 (1902);
- Ex parte Young*, 209 U. S. 123, 161, 162 (1907);
- Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 262; 54 L. ed. 1032 (1910);
- Pitt v. Rodgers*, 104 Fed. 387, 390 (C. C. A., 9th Circ., 1900);
- Mercantile etc. Co. v. Roanoke etc. Co.*, 109 Fed. 3, 6 (C. C., Va., 1901);
- Iron Mountain R. Co. v. Memphis*, 96 Fed. 113, 131 (C. C. A., 6th Circ., 1899);
- Home Ins. Co. v. Virginia etc. Co.*, 109 Fed. 681, 689 (C. C., S. C., 1901);

- Starr v. Chicago etc. Co.*, 110 Fed. 3, 6 (C. C., Neb., 1901);
State Trust Co. v. Kansas City etc. Co., 110 Fed. 10, 12 (C. C., Mo., 1901);
Central Trust Co. v. Western etc. Co., 112 Fed. 471, 476 (C. C., U. S., 1901);
Stewart v. Wisconsin Cent. R. Co., 117 Fed. 782, 783 (C. C., Ill., 1902);
Equitable Trust Co. of N. Y. v. Rollitz, 207 Fed. 74 (C. C. A., 2nd Circ., 1913).

Section 720 of the Revised Statutes Does Not Prevent a Court of the United States Which Has Acquired Jurisdiction of a Particular Controversy From Enjoining the Parties Thereto From Prosecuting a Subsequent Action in Relation Thereto in the Courts of a State.

- French v. Hay*, 22 Wall. 238, 253;
Dietzsch v. Huidekoper, 103 U. S. 494;
Western Union Telegraph Co. v. L. & N. R. Co., 201 Fed. 919, 922 (C. C. A., 7th Circ., 1912);
St. Louis I. M. & S. Ry. Co. v. Bellamy, 211 Fed. 172, (Dist. Ct., Ark., 1914).

This proposition is not disputed, and the only question is as to whether or not the matters involved in the suits in the federal court are the same as the matters involved in the adjudication proceeding. In regard to the suits in the state court, it is alleged by the bill of complaint herein that in the year 1908 complainant filed its bill of complaint in the federal court against the defendants Harney Valley Improvement Company and Silvies River Irrigation Company, alleging that they threatened to take, appropriate and divert away from Silvies River and away from the lands of the complainant, a large amount of the water of the said river, to the great damage of the complainant, and prayed that they be enjoined and restrained from taking, diverting or appropriating any of the waters of the said river above the lands of the complainant; that thereafter, the defendants duly appeared and answered the

bill of complaint, denying the rights of said complainant as alleged in its bill of complaint, and claiming a right to take, divert and carry away a large amount of the water of the said river, and asking that the right to do so be adjudged in their favor, and as against the said complainant; that thereafter complainant duly filed its replication, and that the suit has ever since been at issue, pending and undetermined in the federal court; that in 1908 the complainant filed in the federal court its bill of complaint against the William Hanley Company, reciting that said defendant was taking and diverting water from Silvies River and was maintaining structures in said Silvies River and in the banks thereof which were interfering with and encroaching upon the rights of said complainant in and to the waters of said Silvies River, and praying that said defendant be enjoined and restrained from such taking, diversion and use of said waters, and from maintaining the other structures in and upon the said river which were complained of by said complainant; that thereafter the said defendant William Hanley Company duly appeared and filed answer to the bill of complaint, claiming the right to divert and use certain waters of said river, and to maintain and operate such structures and works in and upon said river, and denying that the same unlawfully interfered with the rights of the complainant; that thereafter the said complainant duly filed its replication to said answer, and said suit has ever since been, and is now, pending and undetermined, and that said suits involve all of the rights of the complainant as against said defendants, and all of the rights of said defendants in and to the waters of said river as against said complainant, and that said rights are still pending and undetermined in said court (Trans. Fols. 4, 5). That those suits involved and put squarely in issue the relative rights of the Pacific Live Stock Company on the one hand, and the Harney Valley Improvement Company, Silvies River Irrigation Company and William Hanley Company in and to the waters of Silvies River, seems plain. It is equally plain that that is exactly what is involved

in the adjudication proceedings so far as those parties are concerned.

The proceeding is for "the determination of the *relative* rights of the various claimants to the waters of that stream". (Sec. 11.) The determination in that proceeding is "an order determining and establishing the *several* rights to the waters of said stream". (Sec. 24.) The determination is declared to be conclusive "as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination". (Sec. 33.)

It is therefore obvious that in both proceedings the complainant would have to prove its alleged rights, and the defendants would have to prove their alleged rights; they would both be involved and subject to determination in the suits as well as in the adjudication proceeding. In both cases, the subject-matter as between these parties was the same, viz: the water rights claimed by them in Silvies River, and in both was involved the existence and extent thereof.

The only way in which the circuit court endeavors to avoid this result is that the *form* of the proceedings was different. The following is the language used by the district court:

"That before the State Board is to ascertain, determine and fix the relative rights of all the claimants, including the complainant, to the use of water from a common source, while the purpose of the suits pending in this court is to enjoin threatened interference by certain parties with the complainant's use of the water." (217 Fed. 95.)

It can be readily seen that this is no proper test of whether or not one suit involves the same issues and subject-matter as another suit. If that were a proper test, it would result that if one claimant to water should bring a suit in the federal court against an upper user of water, "to enjoin threatened interference by certain parties with the complainant's use of the water", and such defendant should appear and put in issue the rights of the complainant and likewise set up his own rights

in defense, he nevertheless could later institute a suit in the state court in the nature of a suit or proceeding to establish title or "to ascertain, determine and fix the relative rights" of himself and the plaintiff in the suit in the federal court. Such a result would simply mean that by changing the form of the action the jurisdiction of the federal court could be effectually destroyed. That such a thing cannot be done under circumstances exactly as outlined above, was decided by this court in the case of *Rickey Land & Cattle Company v. Miller & Lux*, 218 U. S. 258, 262; 54 L. ed. 1032. In that case, Miller & Lux, a lower appropriator of Walker River, commenced a suit in the federal court against Rickey, an upper claimant on the same river, to enjoin a threatened interference by him with the complainant's use of the water of Walker River. After the federal court had thus acquired jurisdiction, the defendant Rickey transferred his rights to the Rickey Land & Cattle Company, and it then brought a suit in the state court, setting up its alleged rights in and to the waters of Walker River, and asked that its title thereto be quieted as against Miller & Lux, the complainant in the case in the federal court. Miller & Lux then instituted an ancillary suit in the federal court to enjoin the prosecution of the action instituted in the state court by the Rickey Land & Cattle Company, on the ground that it involved the same subject-matter over which the federal court had already jurisdiction. It was held by the circuit court and by the circuit court of appeals, and finally by this court, that the suit was maintainable, and that the Rickey Land & Cattle Company should be enjoined from prosecuting the suit in the state court, for the reason that the two suits involved the same subject-matter. That decision is squarely in point in this case, for there, as here, the first suit filed in the federal court was in the form of a suit for an injunction to enjoin a threatened interference with the rights of the complainant. The suit filed in the state court in the above case was for the purpose of establishing and quieting title to the water rights of the defendant to the case in the federal court, and it was held that notwithstanding the

difference in form of the actions, they necessarily involved the same issues and the same subject-matter, and that consequently the court first acquiring jurisdiction would continue it to the end, and would enjoin any interference therewith by the prosecution of any suit in the state court involving the same subject-matter and issues.

Any other rule would obviously destroy the entire effect of this wholesome rule governing courts of concurrent jurisdiction, for practically every form of action has its counterpart. One person in a controversy over land may bring an ejectment suit to recover it; another party claiming an interest in the same land may bring a suit to quiet title to it; and a third person may bring an action in trespass to try title. On this theory, by simply changing the form of action, the jurisdiction of any court in any of these cases mentioned could be ousted by a new suit filed in a court of some other jurisdiction.

We therefore submit that the test applied by the circuit court in this matter was entirely erroneous, and that the proceedings in the state and federal courts involved the same issues and the same subject-matter as between these parties, and that the complainant is entitled to maintain and protect by this bill of complaint the prior jurisdiction of the federal court, and that the demurrer thereto was therefore improperly sustained, so far as those defendants are concerned.

III.

IF IT SHOULD BE HELD THAT THE ADJUDICATION PROCEEDING IS A JUDICIAL PROCEEDING FOR THE FINAL DETERMINATION OF WATER RIGHTS, THEN THE COMPLAINANT WAS ENTITLED TO HAVE THE SAME REMOVED INTO THE FEDERAL COURT, AND IT HAVING TAKEN ALL OF THE PROCEEDINGS NECESSARY TO REMOVE THE SAME INTO THAT COURT, THIS SUIT WILL LIE TO RESTRAIN PROCEEDINGS BEFORE THE STATE BOARD AFTER SUCH REMOVAL TO THE FEDERAL COURT.

It is not disputed that the complainant took all of the proceedings necessary to remove the adjudication proceeding into the federal court, provided it was a proper case for such removal. And it is a well-settled rule of law that where the proper steps have been taken to remove a case into the federal court, a bill in equity may be maintained against the parties thereto to enjoin the further prosecution of the suit in the state court. In the case of *Madisonville Traction Company v. St. Bernard Mining Co.*, 106 U. S. 239, 244; 49 L. ed. 462, 464, it is said:

“After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating Sec. 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) forbidding a court of the United States from enjoining proceedings in a state court—to restrain the *party* against whom a cause has been legally removed from taking further steps in the state court. *French v. Hay*, 22 Wall. 252, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 496, 497, 26 L. ed. 497, 498; *Moran v. Sturgess*, 154 U. S. 256, 270; 38 L. ed. 981, 985. See also, *Sargent v. Helton*, 115 U. S. 352, 29 L. ed. 413; *Harkrader v. Wadley*, 172 U. S. 165, 43 L. ed. 405; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 969; *Texas & P. R. Co. v. Kuteman*, 54 Fed. 551; re *Whitelaw*, 71 Fed. 733, 738; *Iron Mountain R. Co. v. Memphis*, 96 Fed. 131; *James v. Central Trust Co.*, 98 Fed. 489.”

Also in accord with this proposition are:

- Wagner v. Drake*, 31 Fed. 849, 853 (Dist. Ct. Iowa—1887);
B. & O. R. R. Co. v. Ford, 35 Fed. 170, 173 (C. C., W. Va—1888);
Abeel v Culberson, 56 Fed. 329, 331 (C. C., Tex. —1893);
Mutual Life Ins. Co. v. Langley, 145 Fed. 415 (C. C., S. C.—1906);
C. R. I & P. R. Co. v. Stepp, 151 Fed. 908 (C. C., Mo.—1907); affirmed in 164 Fed. 985;
M'Alister v. C. & O. Ry. Co., 157 Fed. 740, 743 (C. C. A., 6th Circ.—1907);
Donovan v. Wells Fargo & Co., 169 Fed. 363, 371 (C. C. A., Mo.—1909).

The only question, therefore, is whether or not the proceeding was removable. Before presenting in detail the authorities sustaining the right of removal, we shall consider separately each of the grounds relied upon by his Honor Judge Bean, in holding that the proceeding was not removable. These grounds will be found in volume 199 Federal, page 495. Taking them up seriatim, we make the following suggestions in regard thereto:

(a) The suggestion that a proceeding to determine water rights is in the nature of a partition suit and therefore not removable is not sustainable, for the reason that it is universally held that appropriators of water are not tenants in common, nor joint tenants, but that the right of each is separate. In this connection we rely particularly upon the following cases:

- Foreman v. Boyle*, 88 Cal. 290;
Senior v. Anderson, 138 Cal. 716, 723;
Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059-1061;
City of Telluride v. Davis, 33 Colo. 353; 80 Pac. 1051-1052;
Hildreth v. Montecito Creek W. Co., 139 Cal. 22.

In *Foreman v. Boyle*, supra, it is said:

“The owners of two different tracts of land, each of whom owns a certain number of inches of the

waters of a stream, and who have appropriated the amount of water owned by each by means of irrigating ditches leading from the channel of the stream to each tract, and carrying different amounts of water, neither owner having any interest in the land, water, or ditch of the other, have no joint or common interest which authorizes them to unite as plaintiffs in an action for damages against a third party for diverting the water, or which will sustain a joint judgment for damages." (Syllabus.)

See also *Senior v. Anderson*, 138 Cal. 716, 23.

Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059-1061, states the rule as follows:

"To constitute a tenancy in common, there must be a right to the unity of possession (17 Am. & Eng. Enc. L., 2nd ed., 651), and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for *the parties can have no title to the water itself.*" * * *

"It appears from this record that there was not any unity of possession in the ditches, land, date of appropriation, use of the water, or the right to its use, and there is no tenancy in common."

In *City of Telluride v. Davis*, 33 Colo. 353; 80 Pac. 1051, 1052, the subject of tenancy in common is discussed as follows:

"We think the court below erred in holding that the appropriation made by B. and D. invested them with a joint ownership of the water appropriated. While it is true they acted together in making the appropriation and in constructing the ditch, it was their understanding that each was to be entitled to one-half of the water so appropriated, and such share was to be applied on the separate estate and land of each; and, while there was a unity of possession in the water while it was being carried through the ditch, yet when it reached the Ohio placer, the property of Mr. B., such unity of possession ceased, and half of the water was diverted to his individual use, while the remaining half was continued on till it reached the Kokomo

placer, the separate and individual property of the appellee. The water was not used or to be used upon any land jointly owned by them, but, as stated above, was to be used upon each one's separate and individual land. In these circumstances, the right to a unity of possession necessary to constitute a tenancy in common did not extend to the right of user, which is essential to the existence of such a tenancy in a water right. *Norman v. Corbley*, (Mont.) 79 P. 1059."

In *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, where the court was considering mainly the question of what persons were entitled to participate in the use of water because of its alleged devotion to public use, it said:

"Where a number of persons owning land are each entitled take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary they will be the owners in common of the diversion works and conduits; *but the respective water-rights will remain several and will remain private property.*"

Consequently, it is universally held that in suits to determine rights to land or water prosecuted against several defendants claiming separate rights therein, the controversy between plaintiff and each defendant is separable and that any defendant is entitled to a removal where the requisite diversity of citizenship exists.

M'Mullen v. Halleck Cattle Co., 193 Fed. 282;
Starnbrough v. Cook, 38 Fed. 369;

Connell v. Smiley, 156 U. S. 335; 15 Sup. Ct. 353;
Sharp v. Whiteside, 19 Fed. 150;
Fritzlen v. Boatmen's Bank, 212 U. S. 364; 29
 Sup. Ct. 366; 53 L. ed. 551;
Elkins v. Howell, 140 Fed. 157.

The same rule is applied to condemnation suits prosecuted against several defendants owning separate parcels of land.

Boom Co. v. Patterson, 98 U. S. 403; 25 L. ed. 206;
Railroad Removal Case, 115 U. S. 1; 29 L. ed. 319;
Searl v. School District, 124 U. S. 197; 8 Sup. Ct. 460; 31 L. ed. 415;
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239; 25 Sup. Ct. 251; 49 L. ed. 462;
Railroad Co v. McKell, 75 Fed. 34;
Deep Water Ry. Co. v. Western etc. Co., 152 Fed. 824.

(b) The claim that the proceeding is not judicial because "the board has no power to make an adjudication of the rights of the claimants" is unfounded under the terms of the act. The act provides:

"As soon as practicable after the completion of said data and the filing of said petition, it shall be the duty of the board of control to make and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of the stream. * * * The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operations shall be stayed by a stay bond as provided for by this act. (Sec. 24.) * * * The determination of the board of control as confirmed or modified as provided by this act in proceedings shall be *conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.* (Sec. 33.) * * * and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be *barred and estopped* from subse-

quently asserting any right theretofore acquired upon the stream or other body of water embraced in such proceeding, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him." (Sec. 34.)

Section 55 gives the board power to itself enforce its determination by actually closing and otherwise regulating ditches and headgates.

The binding force of the determination of the board is recognized by the Supreme Court of Oregon in *Wattles v. Baker County*, 59 Or. 255; 117 Pac. 417, where it is said:

"This determination is then to be entered in the records of the board, *and is in full force and effect from the date of such entry*, unless a stay bond is filed as provided in the act. A copy of the order, together with the evidence, is filed in the Circuit Court, and a time is fixed by the circuit judge for the hearing of such determination; and if no exceptions to the determination are filed within the time set for a hearing, the court enters a decree affirming the determination."

It may be that a distinction is intended to be made between a "determination" and an "adjudication" of rights. We submit that the word "determine" is the most adequate word to denote judicial action.

"A judge is to *determine* rights. He may be, and often is, given authority to enforce his decision, but this is not necessary. The function of *determination* is the essential element in the judicial position. The power to enforce the decision is accidental."

Gray's Nature & Sources of Law, p. 110.

(c) If the suggestion be adopted that the proceeding is to all intents and purposes in the court all the time and the board "is in effect a standing examiner, created by the state, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be *authoritatively settled and determined by a judicial*

tribunal”—then we are as much entitled to have the evidence taken and the facts found in the federal courts as we are to have the adjudication made therein. This is directly decided in the following cases:

In

Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 228; 53 L. ed. 150,

it is said:

“If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two, pure matters of fact. When these are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent.”

The same doctrine was announced in

Smyth v. Ames, 169 U. S. 466, 478; 42 L. ed. 819, 838,

where it was said:

“A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis v. Gray*, 83 U. S. 203, 221, 21 L. ed. 447, 453; *Cowley v. Northern Pacific R. R. Co.*, 159 U. S. 569, 583, 40 L. ed. 263, 267. So, ‘wherever a citizen of a state can go into the courts of a state to defend his property against illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory

invaded by unauthorized acts of its own officers, to suits for redress in its own courts'."

See also to same effect:

Willcox v. Con. Gas Co., 212 U. S. 19;

Des Moines Street Ry. Co. v. Des Moines, 151 Fed. 854.

(d) The third ground relied upon, namely, that the proceeding is by the state, finds no support in the act. The state has no title to the water whatever.

Howell v. Johnson, 89 Fed. 556;

Palmer v. Railroad Com., 167 Cal. 163; 138 Pac. 997.

The state is no more represented by the board than it is by a court which it has created. It has not made itself a party to the litigation; it has never consented to be sued. (*Keene v. Smith*, 44 Or. 525; 75 Pac. 1065.)

(e) The main ground, however, for the contention that the proceeding is not removable is the claim that the proceeding is administrative and not judicial.

This is a subject on which much has been said, and on which much will be said in the briefs in this case; but it seems to us that there has been considerable said on the subject without any very clear definition or understanding of the sense in which those terms are used. In the first place, we take it that a suit or other proceeding by which the relative rights of private citizens in and to their property are determined, is necessarily a judicial proceeding. In other words, if the proceeding is such as to constitute due process of law, and results in a determination of the relative rights of property, which determination is binding and conclusive as *res judicata*, such a proceeding is necessarily judicial in its nature.

Assuming, then, any given suit or proceeding of a judicial nature, its essential character is in no way changed by the fact that in the conduct of that suit, certain officials may exercise administrative, or more properly ministerial, functions, or, if you will, quasi judicial

functions. For instance, the clerk of the court in accepting and filing pleadings and papers in a judicial proceeding is acting purely in a ministerial capacity, and discharging only administrative or ministerial duties. In the same way an examiner who is appointed by the court to take and report the evidence in such a judicial suit or proceeding is acting entirely in a ministerial or administrative capacity, and is discharging only administrative or ministerial duties; and even the commissioner of the court, or even of an appellate court, authorized to examine the case and make his report to the court as to the law and facts and authorized to recommend to the court an opinion and decision based upon such law and facts, is still only an administrative or ministerial officer, only discharging administrative or ministerial duties, or possibly duties which some persons would term "quasi judicial" functions. (*People v. Hayne*, 83 Cal. 111.) In that case, a commission of the Supreme Court of California had been created and it had power to examine and report the facts or conclusions to the court for its judgment, and its actual practice was to write a formal opinion which it recommended to the court, and the court simply adopted it and based its judgment upon it. Notwithstanding it was held this did not constitute judicial power, but that "it is inherent power not only to decide, but to make binding orders or judgments, which constitutes judicial power". This matter is referred to as emphasizing the fact that the mere fact that important administrative or ministerial powers are exercised by certain officials in a proceeding essentially judicial, does not in any way affect the nature of the *proceeding*. The particular *act* may be ministerial, and may be called quasi judicial; but whatever it may be, or whatever it may be called, it does not affect the nature of the *proceeding* itself.

On the other hand, there are certain *proceedings* which are administrative for the converse reason that they do not involve a final determination of private property rights. Such proceedings are, for instance, proceedings in the United States land office, for the acquisition of title of land. In such cases, the land

department is not passing upon or adjudicating vested rights of property, but it is administering the land laws in order to see that they are properly administered, and those, and only those, who comply therewith acquire the public lands; and in administering them, of course the officials must first ascertain the law, and in ascertaining the law they pursue the same mental process as the judge pursues in an action at law or suit in equity. But they are not acting judicially in the sense that they are making binding determinations as to vested rights of property. They are simply ascertaining the law for their own guidance, as every official, and in fact every private person, may or should do before acting on it. It is frequently said that under such circumstances the officials exercise quasi judicial functions. This phrase does not particularly tend to clarify the situation, but all that it means is that they are proceeding in a regular way to ascertain the law just as a judicial officer does in a judicial proceeding. It will, therefore, be seen that the mere fact that the ministerial or administrative officer of the land department is exercising functions which are like unto the functions exercised by a judicial officer, does not change the essential character of the proceeding itself. The proceeding is not judicial because it is not for the purpose of determining the rights of private persons to private property, but it is administrative because it is simply determining whether or not the particular party has or has not complied with the provisions of the land laws so as to entitle him to the land which he is seeking to acquire.

Applying this distinction to the case at bar, it occurs to us that there has been considerable confusion in determining whether or not a proceeding to adjudicate water rights is judicial in its nature, in confusing the fact that certain duties performed by certain officials in such a proceeding are administrative with the conclusion that the proceeding is itself administrative or judicial, as the case may be. In other words, the mere fact that the state has created a state engineer or state water board, with authority to do certain acts, even involving,

it may be, the taking of all the evidence in the proceeding, and even the preparation and recommendation of findings and judgment, and even if all of those things are administrative or ministerial, still the proceeding itself may be judicial, and that is to be determined alone by the criterion,—Does it involve a final determination of private rights of property? If the water law had provided for the inauguration of this identical proceeding in the circuit court of the state, and had created this identical water board and designated it as a standing examiner of the court, with power to collect all of the evidence in the case, and recommend findings and judgment, the ministerial or administrative character of its functions would have been undoubted, but no one would have contended that the proceeding in court for that reason ceased to be judicial. For all intents and purposes, that is exactly what this act has done; for as Judge Bean said in *Re Silvies River*, 199 Fed. 495:

“In so far as the board has jurisdiction over the adjudication of water rights, it is in effect a standing examiner, created by the State, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be authoritatively settled and determined by a judicial tribunal.”

Therefore, in reaching a decision on this subject, a careful distinction should be noted as to decisions which hold that the particular duties performed in such a proceeding by the state engineer or the state board of control, are administrative in character, or ministerial, or quasi judicial, but which have little or nothing to do with the question as to the nature of the proceeding itself, and we respectfully submit that whatever may be the nature of the duties performed by the state water board in an adjudication proceeding, the proceeding itself is judicial, in character, and was so intended by the legislature of Oregon.

(f) The next thing that should be carefully noted is that there is one, and only one, proceeding provided or contemplated from the inauguration of the proceeding:

Petition filed with the Water Board (§ 11); Notice of the Proceeding (§ 12); Service of Notice on Claimants (§ 13); Answers or Statements of Claims by the Various Claimants (§ 14); Verification of Statements (§ 15); The Taking of Testimony before the Superintendent of the Water Division (§ 16); Notice of the Completion of Testimony (§ 18); Filing of Contest (§ 19); Hearing of Contest (§ 20); Filing of Such Evidence with the Board of Control or State Water Board (§ 22); Order of the State Water Board "Determining and Establishing the Several Rights to the Waters of the Said Stream" (§ 24).

This determination is filed with the clerk of the circuit court of the state "by which court such determination is to be heard" (Sec. 24). "The determination of the board shall be in full force and effect from the date of its entry on the records of the board, unless and until its operation shall be stayed by a stay-bond, as provided for by this act" (Sec. 24). An order is then obtained "fixing the time at which the determination shall be heard in said court" (Sec. 24). Upon the final determination a certificate is issued to each claimant by the board of control (Sec. 25). Within thirty days after filing the determination and evidence with the court, "any party may file exceptions to the determination. If no exception shall be filed, the court shall, on the day set for hearing, enter a decree affirming the determination of the board". After the hearing the court shall enter a decree affirming or modifying the order of the board of control (Sec. 26). Pending the hearing in the court, the water is divided in accordance with the order of the board (Sec. 28). Section 33 provides that "The determinations of the board of control as affirmed or modified as provided by this act shall be conclusive as to all prior rights, and the rights of all existing claimants on the stream or other body of water lawfully embraced in the determination."

That there is but one proceeding is made still more clear by the fact that when the matter reaches the court no process of any kind is issued from the court or served

on the parties. Section 24 provides that upon filing the determination with the court an order is made fixing the time of hearing and a copy of this order is filed with the county clerk of the county, but no process of any kind is issued or served. This can only be on the theory that process having once been served, the parties must take notice of any proceedings therein.

If the suggestion be made that the proceeding is administrative when before the board but that a new proceeding, judicial in character, is inaugurated when the determination is filed in the district court, no foundation for the claim can be found in the act. If the proceeding in the court is in the nature of an "appeal" then either the determination must be judicial (*Chinn v. Superior Court*, 156 Cal. 478, 481), or the provision for an appeal is nugatory (*Anderson v. Kearney*, (Nev.) 142 Pac. 803). On the other hand, if a *new* proceeding is inaugurated in the court then no process issues from the court and no notice of it is provided for, so that the first principle of due process is lacking under that construction.

It is very clear from these provisions that there is but one proceeding, based upon one petition, and culminating in one determination by the board, which is either affirmed or modified by the court. It therefore cannot be claimed that the proceeding at one time is administrative, and at another time is judicial. The proceeding is always the same, whether some of the acts performed in it be administrative or judicial, and therefore, if the right of removal ever exists in it, it exists from its inception.

IV.

THE JURISDICTION OF THE FEDERAL COURTS CAN NOT IN ANY WAY BE AFFECTED, ABRIDGED OR DEFEATED BY STATE LEGISLATION PRESCRIBING NEW OR DIFFERENT MODES OF PROCEDURE FOR THE DETERMINATION OF CIVIL RIGHTS, OR CREATING SPECIAL TRIBUNALS TO DETERMINE SUCH RIGHTS, OR PRESCRIBING NEW FORMS OF PROCEDURE FOR THE ASCERTAINMENT AND DETERMINATION THEREOF.

When the constitution of the United States conferred upon the federal courts jurisdiction of all suits of a civil nature at common law or in equity, it obviously conferred jurisdiction of all known proceedings of a judicial nature for the determination of civil rights, and obviously, if the states by abolishing all judicial proceedings as they were known at that time and substituting therefor some entirely different proceeding for the determination of such rights, or if the state by abolishing all of the courts then in existence and creating tribunals constituted in an entirely different manner for the determination of such rights, could thus defeat the jurisdiction of the federal courts, the constitutional guarantee would become entirely useless. This was very early realized, and it has accordingly been held that the jurisdiction of the circuit courts in equity is co-extensive with the jurisdiction in chancery as exercised in England, and that it cannot be affected by any state legislation as to practice and procedure.

Wheeling Bridge Case, 13 How. 518; 14 L. ed. 249, 268;

Dodge v. Woolsey, 18 How. 331; 15 L. ed. 401, 407;

Barber v. Barber, 21 How. 582; 16 L. ed. 226, 229;

Payne v. Hook, 7 Wall. 425; 19 L. ed. 260;

Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052.

This jurisdiction cannot be limited by state legislation.

Williams v. Crabb, 117 Fed. 193;

Ray v. Tatum, 30 U. S. App. 635; 72 Fed. 112;

Robinson v. Campbell, 3 Wheat. 212; 4 L. ed. 372;
Wheeling Bridge Case, 13 How. 521; 14 L. ed.
 249, 268;

Dodge v. Woolsey, 18 How. 331; 15 L. ed. 401,
 407;

Lorman v. Clarke, 2 McLean 568;

Fletcher v. Morey, 2 Story 555;

Gordon v. Hobart, 2 Sumn. 401;

Mississippi Mills v. Cohn, 150 U. S. 202; 37 L. ed.
 1052.

This jurisdiction exists although the state law gives exclusive jurisdiction to a state court.

Parsons v. Lyman, 5 Blatchf. 170;

Payne v. Hook, 7 Wall. 425; 19 L. ed. 260;

Lawrence v. Nelson, 143 U. S. 215; 36 L. ed. 130.

And even if no remedy exists in the state courts:

Fletcher v. Morey, 2 Story 555.

If the right exists, and no plain, speedy, and adequate remedy exists at law, the relief may be sought in equity.

Fletcher v. Morey, 2 Story 555.

In the case of *Suydam v. Broadnax*, 14 Pet. 67, the state statute provided that no suit could be instituted upon a claim against the estate of a deceased person, and provided a new method for the payment of such debts, and in holding that such a statute could not affect the jurisdiction of the federal courts, the Supreme Court of the United States said:

"The 11th section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States, and gives to the circuit court 'original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, and in equity', etc., etc. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies so-extensive with these rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of

such state from suit, could be pleaded to abate a suit in the circuit court."

In the case of *Union Bank v. Vaiden*, 18 How. 502, the same court again applied the same ruling, saying:

"But we do not deem it necessary to discuss them in detail, for the law of a state limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there, to which they may be legally or equitably entitled."

In the case of *Hyde v. Stone*, 20 How. 170, 175, the same court expressed the matter in the following language:

"This court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

In the later case of *Payne v. Hook*, 7 Wall. 425, the court again reiterated the matter in the following language:

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.'"

In the case of *Hess v. Reynolds*, 113 U. S. 73, the court again passed upon the proposition that a state

statute giving the probate court exclusive jurisdiction of claims against the estates of decedents could not prevent a removal to the circuit court, and said:

"The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by the state statutes enacted for the more convenient settlement of estates of decedents."

In a still later case, *Lawrence v. Nelson*, 143 U. S. 215, the court said:

"The general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts."

In the case of *Borer v. Chapman*, 119 U. S. 587, the court had occasion to pass upon the proposition of a state statute barring all claims not presented to the probate court, and it was said:

"It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States."

In the same way, it has been held that when the state statute provides a proceeding in rem for the determination of the persons entitled to a distribution of the estate of a decedent that this does not prevent the federal courts from taking jurisdiction of such a proceeding as between residents and non-residents.

Byers v. McAuley, 149 U. S. 608;

Brun v. Mann, 80 C. C. A. 513, 151 Fed. 145; 12

L. R. A. (N. S.) 154.

It has also been held that where such a controversy arises in the probate court, it is subject to removal.

Craigie v. McArthur, Fed. Case 3341; 4 Dall. 474;

Foley v. Hartley, 72 Fed. 570;

In re Foley, 76 Fed. 390.

So notwithstanding the exclusive jurisdiction given by the state statute to the probate court, the circuit court has jurisdiction in a suit in equity to construe a will.

Toms v. Owen, 52 Fed. 417;

Wood v. Paine, 66 Fed. 807.

Also of a suit by a receiver against an executor to reach assets of a corporation assigned in violation of the law.

Heaton v. Thatcher, 59 Fed. 731.

It also has jurisdiction of a bill against executors to enforce the collection of an assessment on shares of stock of a national bank belonging to an estate being administered in the probate court.

Wickham v. Hull, 60 Fed. 326;

Zimmerman v. Carpenter, 84 Fed. 747;

Brown v. Ellis, 86 Fed. 357.

It also has jurisdiction of a bill in equity to recover a legacy.

Domestic & Foreign Missionary Soc. v. Gaither, 62 Fed. 422.

Also of a suit in equity to charge certain distributees with a certain ancestral debt.

Continental Nat. Bank v. Heilman, 81 Fed. 36.

Also of a suit in equity against executors to recover a legacy.

Brendel v. Charch, 82 Fed. 262.

In this case the court said:

"State laws, providing exclusive methods for settling estates, the distribution of the same, and the payment of legacies, cannot oust the jurisdiction of federal courts of equity to afford equitable relief in such cases to distributees or legatees who are

citizens of other states than that of the testator and executor."

The following cases may also be cited to the same general effect:

In re Cilley, 58 Fed. 977;
Comstock v. Heron, 55 Fed. 803;
Martin v. Fort, 83 Fed. 19;
Hayes v. Pratt, 147 U. S. 557;
Jordan v. Taylor, 98 Fed. 643, 646;
Hale v. Coffin, 114 Fed. 567, 574-5;
Hale v. Tyler, 115 Fed. 833, 834-5;
Carrau v. O'Calligan, 125 Fed. 657, 663;
Gallivan v. Jones, 102 Fed. 423, 427.

The foregoing authorities clearly show that the right of removal cannot in any way be affected by state legislation; but the following authorities, directed particularly to an attempt to so do by changing the form of proceedings, are even more directly in point:

In re Jarnecke Ditch, 69 Fed. 161;
Colorado Midland Ry. v. Jones, 29 Fed. 193;
Goldney v. Morning News, 156 U. S. 518, 523.

In the case of *In re Jarnecke Ditch*, *supra*, the court used the following language:

"But the legislature of a state cannot, by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction nor prevent a removal. A state legislature, if the constitution of the state does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine questions of law and fact; and, if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only thing the legislature of a state would have to do to entirely destroy the jurisdiction of the federal

courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. Neither the legislature nor the courts of a state have the power, by giving new names to legal proceedings, to change their essential character. Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the Courts of the United States. *Railway Co. v. Jones*, 29 Fed. 193, 196."

Nor can the right of removal be affected by the form of the proceedings or arrangement of the parties.

Black's Dillon on Removal of Causes, Secs. 22, 90 and 148;

"*A Federal Equity Suit*" by *Simkins*, p. 828;

Barney v. Globe Bank, Fed. Cas. No. 1031;

Richmond v. Brookings, 48 Fed. 241.

It of course must be recognized that at the time of the adoption of the constitution and the enactment of the federal statutes on this subject, the relative rights in a stream might be the subject of adjudication in the ordinary courts, either of law or in equity. In fact, under the laws of Oregon such rights are still subject to litigation and adjudication in the courts of law and equity of that state, and the jurisdiction conferred upon the board of control to adjudicate such rights is at most only concurrent with the like jurisdiction in the other courts of the state. It is clear from the authorities above cited that the mere fact that the state has created a new tribunal to pass upon the rights and has prescribed a new system of procedure therein can in no way affect the jurisdiction of the federal court.

V.

A PROCEEDING FOR THE ADJUDICATION OF RELATIVE WATER RIGHTS AS BETWEEN PRIVATE INDIVIDUALS IS A JUDICIAL PROCEEDING AND IS A CASE WITHIN THE MEANING OF THE FEDERAL STATUTES REGARDING THE RIGHT OF REMOVAL.

1. Definitions of "judicial power" and judicial proceedings. Actions and suits are defined in almost innumerable cases as "the lawful demand of one's rights in the form given by law"; and "any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances"; as "extending to any proceeding in a court of justice seeking a remedy which the law affords and to any legal application to a court of justice".

Johnston v. Commonwealth, 1 Bibb. 598;
State v. Newell, 13 Mont. 302, 34 Pac. 28;
People v. Rensselaer County Judge, 13 How. Pr., 398;
McBride's Appeal, 72 Penn. St. 480;
Jacoby v. Shafer, 105 Penn. St. 610;
Cohens v. Virginia, 6 Wheaton 264, 407;
Marion v. Ganby, 68 Iowa 142; 26 N. W. 40;
Harris v. Phoenix Insurance Company, 35 Conn. 311.

These definitions of "actions" and "suits" relate, of course, to those words in a general sense, and without distinction between *ordinary* remedies and *special* proceedings, or between the forms of actions at law and suits in equity. They show, however, that proceedings to be "judicial" in character need only be applications before a court of justice for remedies which the law affords. "Judicial power" and "judicial action" have equally wide scope of meaning.

The judicial power conferred upon the courts of the United States, says Mr. Chief Justice Marshall, in *Osborne v. U. S. Bank*, 9 Wheaton 738, 819,

"enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States when any ques-

tion respecting them shall assume such form that the judicial power is capable of acting on it. That power is capable of acting only *when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case*, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States”.

In *Ex Parte Milligan*, 4 Wallace 2, it was contended that an application for a writ of habeas corpus did not become a “cause” until two parties were before the court. Mr. Justice Davis says:

“But, it is argued, that the proceeding does not ripen into a cause until there are two parties to it. This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties if the Court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word ‘*cause*’ thus: ‘A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right’—and he says ‘this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action from *ago*, to urge and drive’.

In any legal sense, action, suit and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his ‘cause’ or ‘suit’. * * * But the true meaning of the term ‘suit’ has been given by this Court. One of the questions in *Weston vs. City Council of Charleston*. (2 Pet. 449), was whether a writ of prohibition was a suit; and Chief Justice Marshall says: ‘The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him’. Certainly, Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens v. Virginia*, he says: ‘In law language a suit is the prosecution of some demand

in a court of justice'. Also 'To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand'. When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law."

"Judicial act" has been defined in terms equally broad. Distinguishing such an act from one of legislation it is said:

"Wherever an act undertakes to determine a question of right or obligation or of property upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

People v. Board of Education, 54 Cal. 375;

Field, J., in Sinking Fund Cases, 99 U. S. 700, 761;

Smith v. Strother, 68 Cal. 194;

Wulzen v. Supervisors, 101 Cal. 15.

"Judicial power", it is said in *Grider v. Tully*, 77 Ala. 424,

"is authority vested in some court, officer, or person to hear and determine when the rights of persons or property, or the propriety of doing an act are the subject-matter of adjudication."

In *Hereford v. People*, 197 Ill. 222; 64 N. E. 310, 312, a judicial proceeding is defined as one

"which takes place in or under the authority of a court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability".

"This much may be safely said", says the Supreme Court of Colorado, in *Morton v. Simpkins*, 20 Colo. 438; 38 Pac. 1092,

"when a regularly constituted court of justice is clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence, written or oral, to be produced before such court, and thereupon to render a de-

cision fixing the material rights or interest of one or more persons or bodies corporate, such proceedings by the court must be regarded as judicial and the decision by the Court may properly be denominated a judgment”.

2. *The tribunals given jurisdiction in the adjudication proceeding are courts.*

A court has been variously defined as a place where justice is judicially administered.

3 *Bla. Com.* 23.

A body in the government organized for the public administration of justice at a time and place prescribed by law.

Stenberg v. State, 48 Neb. 312.

That body in the government to which the public administration of justice is delegated.

Tissier v. Rhein, 130 Ill. 110.

Persons officially assembled under authority of law at the appropriate time and place for the administration of justice.

In re Allison, 13 Colo. 528.

An official assembly legally met together for the transaction of judicial business.

Schoultz v. McPheeters, 79 Ind. 376.

See also:

Mason v. Woerner, 18 Mo. 570;

White County v. Gwinn, 136 Ind. 562.

Thus it has been held that a mayor having jurisdiction of all offences against the laws of the state committed within the limits of the city is a court.

Malone v. Murphy, 2 Kans. 250.

A court-martial is held to be a court.

People v. Van Allen, 55 N. Y. 31.

3. *Proceedings to adjudicate water rights before state boards held to be judicial.*

The binding force of the determination of the board is recognized by the Supreme Court of Oregon in *Wattles v. Baker County* (Or.), 117 Pac. 417, where it is said:

"This determination is then to be entered in the records of the board, and is in full force and effect from the date of such entry, unless a stay bond is filed as provided in the act. A copy of the order, together with the evidence, is filed in the Circuit Court, and a time is fixed by the circuit judge for the hearing of such determination; and if no exceptions to the determination are filed within the time set for a hearing, the court enters a decree affirming the determination."

In appeal of *Cleghorn*, 3 Hawaii 216, the court said:

"The statute, as amended by act of 1860, reads thus: 'It shall be the duty of such commissioners to hear and determine all controversies respecting rights of ways, and rights of water, between private individuals', etc.

The commissioners' duties are of a judicial nature, and require them first to hear, then determine."

See also to same effect:

Palolo etc. Co. v. Territory, 18 Hawaii 30.

The legislature of Montana passed an act as follows:

"Sec. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all."

In holding the award of such commission void, the court in *Thorpe v. Woolman*, 1 Mont. 168, said:

"The first question presented is the award of this commission. The powers given this commission by the act under which they conducted their proceedings are clearly judicial. They are empowered by it to apportion the waters in a just and equitable proportion. This required them to determine what was just and equitable between these parties. In the next place the apportionment was to be made with a due regard to the legal rights of all. This required of them to determine what these legal rights were. The organic act of this Territory, which is its fundamental law, limits the power of legislation, vests judicial power in a supreme court, district courts, probate courts, and in justices of the peace. No tribunal which does not belong to one of these classes is legal. As this commission cannot claim to belong to either one of these, it was a tribunal exercising judicial authority without legal warrant and its acts are void. The appellant gained no rights whatever by virtue of this award."

In the case of the Wyoming statute, in order to remove any question of its constitutionality, the constitution of Wyoming was amended to provide for the creation of the board of control, for the supervision of water rights, etc. The constitutional amendment did not *in terms* vest the board with judicial power, and the validity of the statute and the binding effect of the determination of the board was therefore attacked on the ground that it involved the exercise of judicial functions in violation of the provision of the constitution vesting all judicial power in certain courts. In upholding the act the Supreme Court of Wyoming held that the power exercised by the board in adjudicating the right to water was clearly judicial, but held that the exercise of that power was clearly incidental to the powers expressly granted to the board by the constitution, and therefore the statute conferring such power was held to be valid.

Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258.

This case is very important for the reason that it was not even suggested that the determination of the

water rights did not involve the exercise of judicial power, but on the contrary the court expressly stated that the power exercised was clearly judicial in its nature.

The mere fact that the petition or complaint that inaugurates the proceeding is informal and does not state a cause of action, does not affect the judicial nature of the proceeding.

Whiting v. Townsend, 57 Cal. 515.

Nor does the fact that summons is served by mail in any way affect the nature of the proceeding.

Tyler v. Judges, 175 Mass. 71; 55 N. E. 812.

One of the strongest judicial utterances showing that the proceeding is judicial from its very essential nature, is the opinion of McCarran, J., in

Anderson v. Kearney, 37 Nev. 314, decided August 10, 1914, 142 Pac. 803,

where it is said:

“Reading sections 18, 25, and 33 in conjunction with section 44, the act makes conclusive the orders of the state engineer made pursuant to his determination as to all prior appropriations and the rights of all existing claimants upon streams or other bodies of water lawfully embraced in the adjudication.

What is involved in the determination of the state engineer? The right to the use of water for beneficial purposes. Upon what does this right depend? Prior appropriation and beneficial application. Are these questions of law as well as of fact? Manifestly they are. Are they questions which may involve the law and the adjudication and decrees of courts? These questions must all be answered in the affirmative.

It is claimed that these sections, and the policy of the law generally merely confers upon the state engineer ministerial powers, and that even though the powers of the state engineer, as sought to be conferred, are quasi-judicial, the claimant is not deprived of due process of law inasmuch as the statute prescribes that he may appeal to the district

court. These contentions, in my judgment, are untenable, under a strict reading of the statute. By section 44, it is provided that the determination of the state engineer shall be conclusive as to all existing claimants upon the stream. Section 35 emphasizes the conclusiveness of the state engineer's determination and the constitution precludes appeal.

It is suggested that the provisions of these sections are only to confer upon the state engineer ministerial powers in order to carry out a scheme of water supervision and regulation. But, how can this be seriously contended for when by section 44 the final determination of the state engineer is termed 'a decree' and the proceeding is termed 'an adjudication and determination', and the decree of the state engineer is by that section made conclusive as to the existing rights of the claimants upon the stream. Conclusive decrees made by a ministerial officer upon a matter involving the title and the right of possession to property,—that subject with reference to which the fundamental law of this state declares 'the district courts of the several judicial districts of the state shall have original jurisdiction'. * * *

This last observation makes the provisions of the water law of 1913 even more drastic than its words imply, for it confers upon a ministerial officer powers of final determination on matters involving the right of the possession to property and fixes the only avenue of redress for a party aggrieved to a court, which, by constitutional prescription is precluded from assuming appellate jurisdiction. This provision of the water act of 1913 is a nullity. A law which is in conflict with the fundamental law of the state is not a law at all.

It has been asserted that the hearing and proceeding before the state engineer is neither a matter of law, nor in equity. Assuming for the time the correctness of this assertion, the property subject to determination and the property rights subject to the adjudication of the state engineer, in the contemplation of the water act of 1913, are matters which by our constitutional provisions can only be determined by tribunals having jurisdiction in law and equity, as contemplated in that organic act.

Moreover, the question is not as to whether the power exercised by the state engineer, under the provisions of the water act of 1913, is judicial. The question is,—Is the matter involved, i. e. the possession or right of possession to property, one which can only be determined by the exercise of judicial functions? In other words, is the ultimate fact to be determined, the right to be granted or denied, one which can only be granted or denied by the judicial branch of the government?

Water being a property right and its enjoyment arising primarily on appropriation and priority, each of these elements is essential to the right under the doctrine of first in time, first in right. Yet if we give to section 25 of the water law of 1913 the full meaning of the words there used, it is within the power of the state engineer, moreover, it is made mandatory, that the state engineer shall render a finding in case of the claimant who defaults in making proof, that the claimant, regardless of his actual priority, shall be given a later priority than that of others whose proofs were filed in accordance with the provisions of the act.

The very acme of severity, if not absurdity, is reached by section 25 wherein it is prescribed that any person who shall fail to appear and make proof of his claim or right in and to the waters of a stream system, *as required by this act*, prior to the expiration of the period fixed by the state engineer during which proof may be filed, shall be deemed guilty of a misdemeanor and, if an individual person, shall be punished by a fine of not less than \$250 and not exceeding \$1000, or by imprisonment in the county jail for a term of not exceeding six months, or by both such fine and imprisonment, in the discretion of the court. Section 25 as it stands reads that a defaulting claimant shall be divested of his property rights, and moreover he shall be subjected to the indignity of a fine or imprisonment for having given up that right. It has been said by a learned text-writer on the subject of water rights in western states that the laws of Wyoming were adopted in part from the laws of Italy and India. This provision, although not found in the statutes of Wyoming, may have been taken from the laws of

India, but we find no sanction for such provision in a government such as ours.

Mention of section 25 is unnecessary in the matter at bar, except in so far as it goes to refute the assertion that the acts of the engineer are only ministerial. Section 25 carries out the spirit of the law which is to make final the decrees rendered by the engineer. This is absent in the laws of the other states.

Mr. Kinney in his work on irrigation and water rights, in discussing the subject of state control, under a system similar to the Wyoming law, says:

'It was evidently the intent to give him (the state engineer) or board of control, over which he presides, the exclusive jurisdiction in the determination of existing water rights within the state, and the power to enforce his, or its, decisions, in the distribution of the water. In other words, as far as this phase of the subject is concerned, it was to be a government by engineers. But the constitutional convention and the legislature, departing from the original conception of the framer of the bill, gave the right of appeal to the courts. And, further, the supreme court of the state, by its decisions in construing the law after its enactment, has also modified what was undoubtedly the intent of the framer of the bill by holding that an appropriator who had not even presented his claim to the board of control, even after notice of the proceedings, was not estopped from afterward asserting his rights in the district court; and, further, by holding that a water right can not be made an inseparable appurtenance to a certain tract of land, as was attempted by the act, but which feature was held to be unconstitutional, and that too, even after the "views" of the engineer in question and the framer of the bill had been presented to the court. It is true that such an arbitrary method as designed might prevent litigation. But it is also true that if the citizens of this country can not settle their disputes peaceably they should be given the right to resort to the courts for their adjudication as to their respective rights.' (*Kinney on Water Rights*, 2 Ed., Vol. III, p. 2901.)

In the case of *Thorp v. Woolman*, 1 Mont. 168, the Supreme Court of Montana, in passing upon the constitutionality of an act providing for the appointment of three commissioners empowered by the act of the legislature to apportion in a just and equitable proportion the waters of certain streams, without dwelling upon the subject at length, said:

'The powers given this commissioner by the act under which they conducted their proceedings are clearly judicial. They are empowered by it to apportion the waters in a just and equitable proportion. This required them to determine what was just and equitable between these parties. In the next place the apportionment was to be made with a due regard to the legal rights of all. This required of them to determine what these legal rights were. The organic act of this territory, which is its fundamental law, limits the powers of legislation, vests judicial power in a supreme court, district courts, probate courts, and in justices of the peace. No tribunal which does not belong to one of these classes is legal. As this commission can not claim to belong to either one of these, it was a tribunal exercising judicial authority without legal warrant, and its acts are void.'

The decision in the case of *Thorp v. Woolman*, in this respect, was re-announced by the same court in the case of *Thorp v. Freed*, 1 Mont. 656.

It might be said that under a system of water control, such as that contemplated by the acts of the various states in the arid region, and in fact under the act of 1913 of this state, the engineer might determine, for his own administrative purposes, and for the purpose of admitting future appropriations, the exact extent of each appropriator's right, but this is not the object, nor the scope of the proposed action of the state engineer as declared by his notices, upon which the complaint in this case was founded, because by these notices he assumes the province of declaring *relative rights* and draws each claimant into open contest with every other claimant on the river system upon the two important subjects, i. e. amount of appropriation and priority. And acting under the statute of 1913 and under his notices, given pursuant thereto,

he seeks to make final orders and decrees as to their respective relative rights and thereby he declares his intention to make such orders and decrees as will necessarily impair and affect, to the extent of his determination and judgment at least the vested rights of persons whose appropriations have been initiated in accordance with the customs or laws of this state prior to the act of 1913.

By section 84 of the water law of 1913, the legislature, in my judgment, merely sought to carry out that same declaration and purpose and intention which had been a feature in former legislative acts upon the same subject, i. e. to recognize appropriations made under former laws or legislative acts and to keep those appropriations free from being affected or impaired by anything contained in the water law of 1913.

The determination of individual rights upon a river system must not be confused with the determination of relative rights. The determination of relative rights in this instance is one affecting the rights of one individual as against another or a number of others, while the determination of individual rights is one which does not correlate the comparative rights of any other person. The latter might properly be said to be essential under a system of state control in order that the controlling power might supervise and determine the availability of future appropriations, but the former has no place in the contemplation of such a system, but belongs primarily to the courts. Weil on 'Water Rights in Western States,' Vol. II, p. 1103, and authorities there cited."

4. *The fact that the proceeding is before the State Water Board does not prevent it from being a "case" and removable.*

The only case with which we are familiar where the question of removal under the statute creating the state engineer and the state board of control has arisen is the case of *Waha-Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.*, 158 Fed. 137. In that case the statute of Idaho provided for a contest before the state engineer on

an application to revoke and cancel a permit to appropriate water where the work had not been prosecuted in the manner provided by the permit. Such a proceeding was instituted and was removed into the federal court on the ground of diversity of citizenship, and it was asked that the proceeding be remanded on the ground

“that this action involves a controversy under a state statute, and a statute in its nature, and does not involve any question sufficient to confer jurisdiction upon the above entitled court, either by direct suit or by removal of this cause from the state court to the United States Circuit Court”.

The court, after elaborately considering the matter, held that the proceeding was removable and in doing so said:

“The phrase ‘suits at common law and in equity’ can not be construed to embrace only ordinary actions at law and ordinary suits in equity; but it was doubtless intended thereby to include all proceedings carried on in the ordinary law and equity courts as distinguished from proceedings in military, admiralty and ecclesiastical courts. (Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524.) In the majority opinion (p. 20 of 92 U. S.), it is said ‘and a controversy was involved in the sense of the statute whenever any property rights or claim of the parties capable of pecuniary estimation was the subject of litigation and was presented by pleadings for judicial determination’.”

The court also referred to the following language of Chief Justice Marshall:

“The term ‘suit’ is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. Methods of proceeding may be various, but if a right is litigated in a court of justice the proceeding by which a decision of the court is sought is a suit.”

From these provisions it seems to us reasonably clear that there is but one proceeding provided for the determination of water rights by this act. It is a proceeding

before the state board of control initiated by a petition, followed by a notice or summons upon which the default is entered of all those who do not appear, and all those who do appear are required to file a statement or answer setting forth their rights. Evidence is thereupon taken before the superintendent of the water division, who is a member of the board of control. Any party is given an opportunity to contest the right of any claimant, and evidence is taken upon that contest, and the board thereupon enters a decree or order determining and adjudging the rights of all the parties. This adjudication is then referred to the circuit court, which fixes a time "at which the *determination* shall be heard in said court". If no exceptions are filed, it is made the duty of the court to enter a decree "affirming the *determination of the board.*" (Sec. 26.) Exceptions may be filed, and if filed are heard and the determination is either affirmed or modified, and appeals may then be taken to the supreme court, as in other cases. It will be seen from this that the proceeding is judicial from its inception. Notice constituting due process of law is required in the first instance. The proceedings before the state board of control are adversary and not *ex parte*. Testimony is taken in the usual manner, and from that testimony a judicial determination is made by the board which in the absence of exceptions becomes absolutely binding and conclusive, and must be approved as of course by the circuit court. If excepted to, the court either affirms or modifies the determination of the board. The proceeding is therefore entirely different from certain preliminary *ex parte* proceedings which have been held not to constitute a suit, and in order to point that distinction it would be well to refer to those cases. For instance, in certain proceedings for the opening of streets, etc., there is a preliminary *ex parte* proceeding by certain state officers for the purpose of determining the value of the land which is in the nature of an inquest, and is not a judicial proceeding at all, but is subsequently followed by a regular trial and judicial proceeding, and in such case it is properly held that the

preliminary *ex parte* inquest is not removable but the regular judicial hearing is removable.

Boom Co. v. Patterson, 98 U. S. 403; 25 L. ed. 206;

Railroad Removal Cases, 115 U. S. p. 1, 29 L. ed. 319.

But in other cases, where the hearing in the first instance is not merely *ex parte* and non-judicial, it is held that the entire proceeding of condemnation is judicial from its inception and removable accordingly.

Searl v. School District, 124 U. S. 197; 8 Sup. Ct. 460; 31 L. ed. 415;

Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 Sup. Ct., 251, 49 L. ed. 462;

Colorado Midland Ry. v. Jones, 29 Fed. 193;

Mineral Range R. Co. v. Detroit, etc., Co., 25 Fed. 515.

5. The power here claimed to be "non-judicial" has in other cases been held or assumed to be so strictly "judicial" that it could be vested only in a court or other body authorized to perform judicial functions.

Statutes authorizing proceedings against unknown claimants have been before the courts in many cases, and they have uniformly been held to be judicial in character. The authorities sustaining the validity of the Torrens acts, the innumerable cases upholding statutes providing for proceedings against unknown owners in suits to quiet title, in suits for partition, to confirm tax titles, in *ad rem*, etc., deprive the argument that the proceeding is non-judicial of even plausibility. Every proceeding initiated by petition (as distinguished from complaint) and prosecuted by citation (as distinguished from summons) involves the same considerations and elements which counsel urge as rendering this proceeding non-judicial.

The Torrens system of land registration has been adopted by statute in at least six states of the Union. In Oregon the validity of the statute has not been judicially determined. In Illinois the first statute of this

kind was held to be unconstitutional as *conferring judicial powers upon administrative officers*, in

People v. Chase, 165 Ill. 527; 26 L. R. A. 105.

The later Illinois statute obviated this objection and was upheld in

People v. Simon, 176 Ill. 165; 44 L. R. A. 801.

In Ohio the statute was declared unconstitutional for several reasons, one of them being that it did not prescribe due process of law as to known claimants; another being that it attempted to delegate judicial functions to non-judicial officers.

State v. Guilbert, 56 Ohio St. 575; 47 N. E. 551; 60 Am. State Reports, 756.

In Massachusetts the act was sustained in *Tyler v. Judges of the Court of Registration*, being held to vest none of the judicial power of which it required the exercise in non-judicial officers.

175 Mass. 71; 55 N. E. 812; 51 L. R. A. 433.

In Minnesota this same objection to the statute (that it delegated judicial functions to non-judicial officers) was made, but the statute was sustained in

State v. Westfall, 85 Minn. 437; 89 N. W. 175.

That the Colorado statute is valid was determined in

People v. Crissman, 92 Pac. (Colo.) 949.

All of these statutes make provision for an initial decree establishing the title of plaintiff *as against the world*, yet in all of them there is not the slightest expression of a doubt that the exercise of judicial power is involved, nor the slightest intimation that such a proceeding cannot be administered by a court of justice.

The two cases in which statutes of this class were held unconstitutional went either wholly or in part upon the ground that the power exercised in the proceeding was *essentially judicial and that an attempt to confer it upon other than judicial officers was an unconstitutional delegation of judicial power*. The only case in which anything approaching the argument which is here made was noticed in the Minnesota case of *State v. Westfall*,

where the brief of counsel for petitioner made use of a catch-phrase and urged that the legislature could not make the court "a registration office". The hospitality which the court gave to this suggestion is illustrated by the number of words it took to dispose of it:

"Nor does the act attempt to make the Court a registration office as relator claims. It simply confers upon the Court certain judicial duties incident to the plan of registering land titles provided by the act." (Quoted in

People ex rel. Smith v. Crissman, 92 Pac. (Colo.) 949.)

In *American Land Co. v. Zeiss*, 219 U. S. 47; 55 L. ed. 82, the Burnt Record Act of California was upheld. The act provided for a proceeding in rem to establish title to land where the record title had been destroyed by fire. It was claimed that the proceeding was not judicial, since there was no controversy or definite parties. In disposing of this contention the court said:

"We do not deem it important to discuss what constitutes a judicial proceeding, since the statutory proceeding provided by the act was within the authority of the state to enact, and that it was judicial in character has been expressly determined by the court of last resort of the state."

6. *Under the act, all claimants in the stream are defendants and parties to the action, whether they appear or suffer a default.*

Every section and phrase of the act show its intention that all persons claiming any interest in the stream are to be deemed parties to the action and bound by the decree. Thus, in *Van der Poel v. Van Valkenburgh*, 6 N. Y. 190, 198, speaking of a proceeding for the probate of a will, Gardner, J., says:

"It is in the nature of a proceeding *in rem* to which all persons having an interest in the subject of litigation *may make themselves parties and are consequently bound by the decree.*"

So, in *Bonnemort v. Gill*, 167 Mass. 340:

“The decree of the Court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world. Any person interested may *make himself a party to the proceedings* by applying to the proper tribunal, and he is forever bound by the decree whether he is in fact a party or not.”

In *Botiller v. Dominguez*, 130 U. S. 238, discussing the statute requiring that all claimants to lands in California under Mexican grants should submit the same to a board of private land claims commissioners for confirmation, Mr. Justice Miller, after holding the proceedings to be “judicial” and to afford “due process of law”, says:

“Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual or by the government under which he lives. It is a necessary part of a free government in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them. No doubt could exist, and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title if he had any. Such suits would have been sustained, without hesitation, as being legal, constitutional and according to right. What difference can it make then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended.”

Who is a "party" to an action of proceeding?

"Parties in that connection" (i. e. with respect to the conclusiveness of judgments) "include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are directly interested in the suit and have knowledge of its pendency and who refuse or neglect to appear and avail themselves of those rights are equally concluded by the proceedings."

Robbins v. City of Chicago, 4 Wall. 657, 672.

For a long list of cases to the same effect, see 24 Am. & Eng. Ency. Law (2nd Ed.) 735.

7. *In a proceeding under the act all unknown claimants are adverse parties from the beginning. The mere possibility of adverse parties would, however, be sufficient to render a proceeding "judicial."*

Authorities in number, dealing with suits against unknown owners, have already been considered. Many authorize a plaintiff in particular actions respecting the title of real property to join as defendants with those who are named "all persons known or unknown claiming any interest in the property". Other statutes provide for suits, naming as defendants *only* persons designated by general description, or for notice "to all concerned". But, whether parties sued by general designation are under such statutes joined with named parties or not, the same considerations control.

As observed by Chief Justice Holmes in the *Tyler* case, where parties are sued by general designation, the fact that *other* defendants are *named* cannot distinguish the case, so far as the former are concerned, from a case where *all* are sued by general designation. The joinder of named defendants does others "no good as they are not named". (175 Mass. 71, 75.)

A proceeding is judicial whenever, upon a party "making a demand in a court of justice for such remedy

as the law affords", process is provided for ascertaining the existence of persons claiming adverse interests, for notice to such persons, and for the hearing and adjudication of such rights as they may urge in opposition to the relief demanded by the plaintiff. The *most* that can be held essential to such a proceeding is, that there *may be* adverse parties. This is all that is certain in nearly every special proceeding instituted by petition, and prosecuted by citation.

In re Pac. Ry. Commission, 32 Fed. 241, Mr. Justice Field says:

"Whenever the claim of a party under the constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present *or possible* adverse parties, whose contentions are submitted to the court for adjudication."

So, in *Ormsby v. Webb*, 134 U. S. 47; 10 Sup. Ct. Rep. 478, speaking of a petition for probate and pointing out the features in which it differed from an ordinary suit in equity, the court says that such a proceeding for probate is,

"although of a peculiar character, * * * nevertheless a case in which *there may be* adversary parties and in which there may be a final judgment affecting rights of property".

8. *Various classes of proceedings held to be judicial analogous to those authorized by the act here claimed to be non-judicial.*

(a) THE TORRENS ACT OF THE VARIOUS STATES AND THE BURNT RECORDS ACT OF ILLINOIS AND CALIFORNIA.

The numerous cases upholding the validity of proceedings under the Torrens system of land registration are cases in which not only declaratory decrees were involved, but in which they were binding upon all persons known and unknown. The same is true of those

sustaining the Burnt Records Act of Illinois and California. These have already been reviewed, and need not be again considered at this point.

(b) PROCEEDINGS FOR THE CONFIRMATION OF TAX
TITLES, ETC.

In a number of states there exist statutes authorizing proceedings for the confirmation of tax titles, in most of which provision is made for the joinder of the original owner of the land *and all other persons, known or unknown*. Numerous cases involving statutes of this class have already been cited. It is obvious that, like the Torrens Acts, such statutes provide proceedings for declaratory decrees binding upon the world.

The statute of Arkansas is of this class. It has been upheld without suggestion of its invalidity in numerous cases (see cases cited, *21 Enc. of P. & P.*, 492), is treated as an action *in rem*, which concludes absent claimants as well as participating parties (*Worthens v. Ratcliffe*, 42 Ark. 330), and has received the approval of the supreme court of the United States in at least two cases.

Parker v. Overman, 18 Howard 137;
Thomas v. Lawson, 21 Howard 331.

(c) SUITS UNDER GENERAL EQUITY JURISDICTION TO
ESTABLISH TITLE.

Suits to *establish* title are not dependent for their existence upon statutory authorization. They constitute an accepted and undoubted branch of equity jurisprudence. Chancery will take jurisdiction where for any reason the record title of a party is imperfect, *for the very purpose of establishing that title as matter of record*. In exercising such jurisdiction equity, of course, proceeds against particular defendants except where statutes providing for general service upon unknown owners exist; but the basis for the exercise of the jurisdiction is *the absence of a record title*. For the purpose of establishing such title, equity treats the case as analogous to a bill for the re-execution of a lost or

destroyed instrument, and, *without reference to adverse claims, will give to the party who holds a legal but not a record title the means of establishing it of record by a decree of court.*

Sharon v. Tucker, 144 U. S. 533, 10 Sup. Ct. Rep. 720;

Blight's Heirs v. Banks, 6 T. B. Mon. (Ky.) 192;

Hord v. Baugh, 7 Humph. 576;

Montgomery v. Kerr, 6 Cold. 199;

Bohart v. Chamberlain, 92 Mo. 622; 13 S. W. 85;

Gwin v. Brown, 21 App. D. C. 295, 312;

Johnson v. Thomas, 23 App. D. C. 141, 148;

Harvey v. Miller, 24 App. D. C. 51, 53.

Before leaving this point, one more case may be cited. It is interesting for two reasons: First, because it shows that the holder of a legal title may sue to establish that title of record, even though there has been no disturbance or danger or threat of disturbance of the complainant in his possession or title by the holders of the outstanding claim; second, because the argument of counsel in that case closely resembled the contention in the case at bar. The granting of the relief prayed by the bill was resisted because "*the petition is totally defective, for it presents no fact which shows any injury done, or damage to be done by defendants to him.*" * * * *The court will only apply its remedial justice to prevent an injustice done or about to be done by defendants.*" The court said in answer:

"It is said that the defendants have not disturbed the plaintiff in his possession or title, and that he has therefore no cause of action against them, but our courts have always held that the owner of land may invoke the aid of the court to remove a cloud created by an adversary title, although the adversary title had not been used to disturb him."

After observing that actions of trespass to try title were "every-day practices", whether there had been any disturbance or threat of disturbance of possession, the court concludes:

"The legal effect and object of such suits are solely to establish the plaintiff's and conclude the defendants' title by the judgment."

Moody v. Holcomb, 26 Tex. 714.

9. *Determination even of future rights is judicial.*

If it were material it would not be difficult to show that courts of equity *do* frequently declare as to "future rights". A court of equity will, for instance, "where a man covenants to save another harmless in respect to certain payments which are to be made from time to time", take jurisdiction of a bill filed

"before any breach for the purpose of obtaining a decree that the defendant shall specifically perform his covenant, and a reference to a master will be directed to report from time to time any breach that may happen, so that the action of the Court may at once be taken thereon."

Bispham's Principles of Equity, p. 51.

Indeed, the basis of bills *quia timet* (analogous to the *brevia anticipantia* at common law) is

"to guard against possible or prospective injuries and to preserve the means by which existing rights may be protected from future or contingent violations".

Bispham's Principles of Equity, 607.

So, while it is true, we think that equity will not ordinarily entertain a bill merely to declare the rights of a remainderman, even this rule has its exceptions, and there is

"a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life with an equitable remainder to the person indicated by the testator in his request. In such cases the court will entertain a bill during the life of the first taker to have the right of the claimant in the remainder established."

Cross v. DeValle, 1 Wall. 5, 15.

But the entire subject is of no materiality to this discussion. The proceeding under the statute here involved asks no declaration of "future rights", but the protection and establishment of present rights. The jurisdiction of a court, even in the absence of a statute to establish by decree as matter of record a title which is not matter of record, is so conclusively established by cases of which *Sharon v. Tucker*, 144 U. S. 533, is a type, that further argument upon the question is, we think, uncalled for. Decrees which are

"simply declarative, that is, their main and direct object is to declare, affirm and establish the right, title, interest or estate of the plaintiff, whether legal or equitable",

form one of the large divisions of equitable remedies.

Pomeroy's Equity Jurisprudence, Sec. 171.

VI.

THE CONTROVERSY BETWEEN THE PETITIONERS WHO INSTITUTED THE ADJUDICATION PROCEEDING AND THE PACIFIC LIVE STOCK COMPANY IS A SEPARABLE CONTROVERSY WHICH THAT COMPANY IS ENTITLED TO REMOVE INTO THE FEDERAL COURT.

In determining whether or not the relative water rights of the petitioners and the Pacific Live Stock Company, one of the defendants, presents a separable controversy it will be well to consider briefly the nature of the proceeding involved in the case at bar.

Prior to the passage of the act in question, there were three ordinary ways in which the water rights of parties might be litigated and determined.

1. A person whose water right was interfered with to his damage might maintain an action at law to recover damages. In such a case he could sue one single party who was diverting the water to his detriment, but he could not in such an action join several persons who were separately diverting water to his injury.

People v. Gold Run etc. Co., 66 Cal. 138, 149.

In such a suit, obviously the right of the plaintiff, including the amount of water appropriated by him and the date of his appropriation would be determined. The right of the defendant, including the amount and date and priority of his appropriation would likewise be determined, and if plaintiff's right was superior and was interfered with by defendant, the plaintiff would not only recover damages, but the judgment would be an estoppel or an adjudication as to the relative rights of the parties. The rights of other parties would in no way be considered or determined by the court.

2. Another method would be a suit in equity for an injunction to enjoin a threatened injury, and for damages. In such an action any number of defendants might be joined at the mere option of the plaintiff. He might join one or all, as he saw fit.

People v. Gold Run etc. Co., 66 Cal. 138, 150.

Obviously, in such a proceeding again the rights of the plaintiff would be determined and the rights of the defendant or defendants as the case might be. If the court found that the plaintiff had appropriated a certain amount of water as of a certain date, and that that was superior to the appropriation of the defendant or defendants, it would enjoin defendant or defendants from interfering therewith, and such a judgment would be an adjudication as to the right of the plaintiff, which would be an estoppel against the defendant or defendants. The court would not, and could not, determine the rights of any other party or parties on the stream.

3. A third method would be under the statutes allowing a suit to quiet title to real property. Water being considered real property, such a suit might be maintained against any person making an adverse claim thereto. But here again the plaintiff would have the option of joining such parties as he saw fit, and he could join any number of defendants, whether they claimed in common or separately (*17 Ency. P. & P.*, p. 323). The judgment again would determine the right of the plaintiff, and if superior to the rights of the defendants the right of the plaintiff would be quieted against the defendants and they would be enjoined from interfering therewith, but the court would not and could not in such an action determine the rights of other persons in the same stream.

The nature of the proceeding in the case at bar is obviously almost exactly analogous to a suit to quiet title, except that it is prosecuted against all persons claiming any interest in the stream. The decree does not give any one either damages or an injunction, or any other relief, but simply adjudicates and determines the title, or in other words, quiets it in favor of one party and against another. The cases therefore applicable to the ordinary suit to quiet title against several defendants are strictly applicable to the case at bar, *and it has been uniformly held in suits to quiet title both to land and water, prosecuted against several defendants claiming separate rights therein, that the con-*

trover between the plaintiff and each defendant is separable, and that any defendant is entitled to a removal where the requisite diversity of citizenship exists.

M'Mullen v. Halleck Cattle Co., 193 Fed. 282;

Stambrough v. Cook, 38 Fed. 369;

Connell v. Smiley, 156 U. S. 335; 15 Sup. Ct. 353;

Sharp v. Whiteside, 19 Fed. 150;

Fritzlen v. Boatmen's Bank, 212 U. S. 364; 29

Sup. Ct. 366; 53 L. ed. 551;

Elkins v. Howell, 140 Fed. 157.

We would call the particular attention of the court to the case of *M'Mullen v. Halleck Cattle Co.*, *supra*. That was a suit brought to quiet plaintiff's title to twenty-five cubic feet of water per second of Boulder Creek in Elko County, Nevada, which suit was brought against ten separate defendants, among others the Halleck Cattle Company, a citizen of the State of California. The suit was removed into the circuit court and the court refused to remand it. In doing so the court called attention to the fact that it had been held in previous cases that suits to quiet title to land against several defendants presented severable controversies and could be removed at the suit of one of the defendants, and the court then said:

"I am unable to distinguish the present case, in principle, from the two last cited. True, in the cited cases the subject matter was land instead of water, but the object in each was to settle and determine adverse claims of title. The principle involved is the same. * * * The present case can be separated into parts so as to leave a separate and distinct cause of action between Samuel M'Mullen, a citizen of Nevada, and the Halleck Cattle Company, a citizen of California. On this cause of action a separate and distinct suit could have been brought, and the full nature and extent of the company's claim to the use of said twenty-five cubic feet per second in the waters of Boulder Creek could be determined as against complainant, without the presence of any other defendant as party to the controversy."

The same rule has been applied to a condemnation suit prosecuted against several defendants owning separate parcels of land.

Boom Co. v. Patterson, 98 U. S. 403; 25 L. ed. 206;
Railroad Removal Case, 115 U. S. p. 1; 29 L. ed. 319;

Searl v. School District, 124 U. S. 197; 8 Sup. Ct. 460; 31 L. ed. 415;

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239; 25 Sup. Ct. 251; 49 L. ed. 462;

Railroad Co. v. McKell, 75 Fed. 34;

Deep Water Railway Co. v. Western etc. Co., 152 Fed. 824.

VII.

THE MERE FACT THAT THE LEGISLATURE AUTHORIZES SEVERAL SUITS TO BE BROUGHT IN THE SAME PROCEEDING CANNOT AFFECT THE RIGHT OF REMOVAL.

It will be noticed that section 28 of the judicial code provides for removal of causes in which there shall be "a controversy which is wholly between citizens of different states". It is provided that one or more of the defendants actually interested "in such *controversy* may remove said *suit* into the District Court of the United States for the proper district". It will be seen from this that the statute contemplates that where there is a separable controversy in a suit, the entire suit is removable, although other parties between whom there is no diversity of citizenship are interested therein, and this is the general rule laid down by the decisions

Barney v. Latham, 103 U. S. 205; 26 L. ed. 514;

Hoge v. Canton Ins. Office, 103 Fed. 513.

It will readily be seen, however, that Congress had in mind such general suits as were known at common law and equity, and did not contemplate that the state legislatures might pass acts in which entirely separate *suits* might be joined in one *proceeding*, and it would therefore be entirely proper to hold that if by state legislation practically distinct suits might be brought in the same proceeding, the fact that there was a separable controversy in one of the suits involved in the proceeding would not require the removal of the entire proceeding, but only the particular suit involved in the proceeding in which the separable controversy existed. This view has received the approval of the courts in at least two cases, to which we would call the attention of the court, namely:

Union Pac. Ry. Co. v. Myers, 115 U. S. 1; 29 L. ed. 319, 327;

Deep Water Railway Co. v. Western Pocahontas C. & I. Co., 152 Fed. 824.

It is unnecessary to determine which class of cases the adjudication proceeding belongs to, for in one case the

entire proceeding would be removed while in the other only the suit therein against the Pacific Live Stock Company would be removed. As this does not affect the sufficiency of the complaint herein to state a cause of action, it need be given no further consideration at this time.

Conclusion.

IMPORTANCE OF CORRECT DECISION AS TO THE PROPER BASIS OF PROCEEDINGS FOR DETERMINATION OF WATER RIGHTS.

In the Western States there has been a sharp difference of opinion as to the policy underlying the determination of water rights; some states have adhered strictly to the doctrine that the proceeding should be in the regularly constituted courts of the state. This is true in Colorado, Idaho, North Dakota, Mexico, South Dakota and Utah. (*Wiel on Water Rights in the Western States*, (3d ed.) Sec. 1222.) This is known as the Colorado method. In other states, the endeavor has been made to have the determination made by some specially constituted tribunal or board, and all possible variations of this have been resorted to, in order to meet the particular local constitutional provisions of the various states. The general plan may be termed the Wyoming method. (*Wiel*, Sec. 1206.)

If these methods provide a tribunal with authority and jurisdiction in law and fact to adjudicate and settle water rights under the ordinary safeguards of due process of law, the federal courts are not concerned with the particular method any state may see fit to adopt. But if the local constitution is such that the board selected by the state legislature cannot be given that authority, and therefore the local courts, in order to uphold the act of the legislature, are forced to hold the power conferred to be merely "administrative", or if the legislature does not see fit to confer such power, then the federal constitution does operate to prevent the property of the citizen, viz.: his water rights, being taken by such "administrative" proceeding, and to protect him from the expense which he must incur to prevent a forfeiture of his rights by such an "administrative" proceeding. The trouble with the laws of certain states is that they have confused a mere "administrative ascertainment" of water rights (binding on no one, and made only to enable the state engineer to determine whether other appropriations shall be al-

lowed), with a proceeding to determine and adjudicate *relative* rights as between persons owning vested rights of property. The former is purely administrative, but the owner of a vested right cannot be constitutionally divested of his property for failing to establish his right in such a proceeding; the latter is judicial, no matter what the legislature or local courts may see fit to characterize it.

We respectfully submit that upon any theory of the nature of the proceeding provided by the Oregon act of 1909, the complaint herein states a cause of action under the constitution of the United States, and that the judgment sustaining a demurrer thereto should therefore be reversed.

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IN THE
SUPREME COURT OF THE UNITED STATES

APPEAL FROM THE
CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

No. 200.

PACIFIC LIVE STEAK COMPANY, Appellant.

JOHN H. LEWIS ET AL., Appellees.

APPEAL FROM THE APPELLANT.

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(30639)

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 300.

PACIFIC LIVE STOCK COMPANY, APPELLANT,

vs.

JOHN H. LEWIS ET AL., APPELLEES.

REPLY BRIEF FOR APPELLANT.

Preliminary Statement as to the Facts.

There is no very substantial difference between the parties as to the facts, but there are a few matters contained in appellees' brief that require special notice. In the first place, appellees have attached to their brief what purports to be a map showing the progress of work under the act involved herein. We are not personally familiar with all of this territory, but we do know that, even in large parts of the territory marked as territory in which "testimony" has been taken, this "testimony" consists merely of *ex parte* statements and not formal evidence between adversary parties, and of course in the balance of the territory the surveys are entirely *ex parte*. As we shall show in the course of this brief that, under fundamental constitutional principles, an adjudica-

tion based upon such data cannot be upheld, no hardship can result by a judicial decision that a legislative attempt to do so is invalid.

In the same way counsel have, entirely outside of the record, attached to their brief what purports to be a map of irrigated lands in the watershed of Silvies River, prepared by the State engineer. As counsel has gone out of the record to insert this in the brief, it is equally proper for us to state that this map has been shown to be incorrect in almost every particular, and the State engineer has himself admitted that the man who made it was incompetent, and that the map is entirely unreliable. We are at a loss to understand, therefore, why it should be used to encumber the record in this case or how it can add anything to legal questions involved.

Notwithstanding that the pleadings admit that in order to defend a purely *ex parte* determination the appellant would be compelled to expend fifty thousand dollars, the appellees assume to state that the entire proceeding is at public expense. It is sufficient to say that this statement is entirely unfounded under the terms of the act. Clearly the expense of bringing witnesses to the hearing, the production of evidence, the making of surveys and maps, the expense of producing engineering data as to the flow of the streams and ditches and as to the duty of water, the expense of obtaining copies of the transcript of testimony taken, to say nothing of necessary attorneys' fees, must clearly be paid by the parties. There is certainly nothing in the act even authorizing the board to pay them, much less anything requiring it to do so. The court is given power to assess costs (sec. 26); fees for copies of records of the board are provided for (sec. 32); notices are to be mailed at the expense of the petitioner (sec. 30); originally a deposit of five dollars a day was required from each party (sec. 31). This would have amounted to over a thousand dollars a day in this case, since the contests are not tried as separate suits, but all part of one proceeding (Appellees' Brief, p. 29), and that section

was not repealed until long after the proceeding involved herein was instituted.

ON APPELLEES' OWN INTERPRETATION OF THE NATURE, CHARACTER, AND EFFECT OF THE ADJUDICATION PROCEEDING, THE SAME IS CLEARLY IN VIOLATION OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

The very able and exhaustive brief on behalf of appellees, and the very candid statement of their position, serves to very much simplify the question for decision by this court. In our opening brief, being uncertain as to what position appellees would take, we argued many matters which we feel now require no further consideration. Appellees have definitely taken the position that the proceeding before the State Water Board is in no way judicial, but purely administrative, and largely *ex parte*. In this brief we shall assume the correctness of that interpretation of the act. With this understanding, let us state the character of the enactment against which appellant asks to be protected:

1. *The legislature has authorized a proceeding for the determination of water rights, which is not judicial, but purely administrative, and merely preliminary to the institution of judicial proceedings in the circuit court.*

"We think the proceedings before the State Water Board are purely administrative in character, involving, no doubt, certain *quasi* judicial features, but merely preliminary to the institution of judicial proceedings in the circuit court."

(*Appellees' Brief*, p. 106.)

"The statute prescribing the duties to be performed by the water board and its members in their respective official capacities in a determination of water rights does not confer judicial powers or duties upon the board or such officers in any sense as indicated

by the Constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations final in character. Their findings and orders are *prima facie* final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject-matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made."

In re Willow Creek, 74 Or., 592, 610.

"Now the preliminary proceedings before the State Board of Control in taking testimony and making findings of fact concerning the rights of the various claimants to the waters of a given stream, are, in my judgment, not judicial, but rather administrative."

In re Silvies River, 199 Fed., 495.

2. *Any owner of a water right is required to appear in this purely administrative proceeding and set up and defend his right on pain of forfeiting it.*

"The appellant may be required to appear in these proceedings before the State Water Board and submit its claim, and should it refuse to do so, within the time required by statute, and in the manner therein provided, the decree of the circuit court will be final and conclusive, to the same extent as in any other suit or action in which a party is in default. Appellant practically admits that such result may flow from a failure to appear before the board."

Appellees' Brief, p. 78.

"Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be

barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him."

Water Law, sec. 34.

"We cannot agree with the statement of the learned judge that it is optional with the land owner to have his water rights adjudicated. Section 6656 provides: 'Any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceeding, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him.' It is evident that a failure by the claimant of a water right to appear and submit his claims when properly required to do so bars his right to assert it thereafter to the same extent that a party is barred who makes default after service of summons in a proceeding at law."

Pacific Live Stock Co. vs. Cochran, 73 Or., 417; 144 Pac., 668.

3. *In such purely administrative proceeding the State Water Board thereupon proceeds to take evidence ex parte and without any opportunity or right of cross-examination.*

"The notice in each case specifies the time and place when the superintendent will commence the holding of *ex parte* hearings for the purpose of enabling each claimant to submit proof respecting his respective rights. * * * These hearings are entirely *ex parte* in nature, no adversary pleadings or statements being filed, or proceedings between adverse claimants provided for at this stage of the proceeding."

Appellees' Brief, pp. 25, 27.

"That as a matter of fact the said State Board of Control took no testimony whatever as to the rights of

the various parties to the waters of the said river at the times or places set forth in the said notice so published by the said State Board of Control, but the said State Board of Control at that time simply accepted and received *ex parte* written statements of claims of the various parties claiming rights in and to the waters of the said stream, and the said Board of Control has construed the act of the Legislature of the State of Oregon to mean that at such time no evidence shall be taken by witnesses called and examined and cross-examined by the parties in interest at that time, but that the only evidence that will be received by the board at said time shall be the *ex parte* statements in writing as aforesaid; and the said board has adopted a rule that no other testimony will be taken or heard at said time and no testimony has been taken by the said board in said proceeding other than said *ex parte* statements of the claims of said parties."

Transcript of Record, p. 9.

4. *In such purely administrative proceeding the State Water Board collects data relating to the various rights on the stream entirely ex parte and without any opportunity for cross-examination.*

"The board shall prepare a notice, setting forth the date when the engineers will begin an investigation of the flow of the stream and of the ditches diverting water therefrom." (Water Act, sec. 12.)

"It shall be the duty of the State engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather

such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed."

Water Law, sec. 23.

In the nature of things, this data is gathered *ex parte* and without any opportunity to cross-examine, and in fact without even the sanction of an oath.

Appellees' Brief, pp. 25, 27.

5. *The conclusions of the State Water Board are based either wholly or partially on this merely ex parte, hearsay, non-oathbound evidence, with no opportunity to cross-examine or to be confronted with the witnesses gathering or giving it.*

"As soon as practicable after the compilation of said data and the filing of said evidence in the office of the Board of Control, the board shall make and cause to be entered of record in its office, findings of fact, and an order of determination.

"* * * The original evidence filed with the board, and certified copies of the observations and measurements and maps of record in the State engineer's office, in connection with such determination as provided for by section 6647, Lord's Oregon Laws, together with a copy of the order of determination and findings of the Board of Control, as the same appears of record in its office, shall be certified to by the secretary of the board and filed with the clerk of the circuit court wherein the determination is to be heard."

Water Law, sec. 24.

In fact, the only regular evidence introduced with right of cross-examination is on a contest, and a contest is entirely unnecessary (*In re North Powder River*, 75 Ore., 83), so that in fact the determination is generally based entirely on *ex parte* data, with no opportunity for cross-examination.

Appellees' Brief, pp. 25, 27, 28.

"The maps, plats and records of the investigation made by the State engineer in the matter under consideration are *prima facie* evidence."

In re Willow Creek, 74 Ore., 592, 628.

6. Any one filing his claim in this merely administrative proceeding is required to pay an arbitrary sum of money in the nature of a tax on his land.

Water Law, sec. 17.

Pacific Live Stock Co. vs. Cochran, 73 Or., 417.

7. It is admitted by the pleadings that any one contesting any claim shown by this *ex parte* data must assume the burden of proof and affirmatively disprove the correctness thereof.

(*Transcript of Record*, fol. 16.)

8. It is admitted by the pleadings that unless contested by complainant the board would allow the claims shown by this *ex parte* data.

(*Transcript of Record*, fol. 14.)

9. It is admitted by the pleadings that if complainant does contest and does assume this burden it will cost it fifty thousand dollars to do so.

(*Transcript of Record*, fols. 16, 17.)

10. In this purely administrative proceeding the board not only finds the facts, but makes a "determination" of the relative rights of the parties.

"The board shall make and cause to be entered of record in its office, findings of fact and an order of

determination, determining and establishing the several rights to the waters of said stream." (Water Law, sec. 24.)

11. *In this purely administrative proceeding the determination of the board is in full force and effect from its date.*

"The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided by the act."

(Water Law, sec. 24.)

12. *This purely administrative determination, pending judicial proceedings to which it is merely preliminary, possibly extending over several years, is enforced as a judgment.*

"During the time the hearing of the order of the board of control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the board of control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board."

(Water Law, sec. 28.)

Wattles vs. Baker County, 59 Ore., 255.

13. *Any interference with the enforcement of the purely administrative determination is made a criminal offense.*

"Said water master shall, as near as may be, divide, regulate, and control the use of the water of all streams within his district by such closing or partially closing of the head gates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of

the court determining the existing rights to the use of water."

(Water Law, sec. 39.)

"Any person who shall willfully open, close, change or interfere with any lawfully established head gate or water box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water master or other competent authority, shall be deemed guilty of misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water master or other competent authority shall be *prima facie* evidence of the guilt of the person using it."

(Water Law, sec. 43.)

"The water master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county, and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested."

(Water Law, sec. 44.)

14. *No injunction can be had to restrain the enforcement of this merely administrative determination.*

"Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control."

(Water Law, sec. 39.)

15. *According to the act this determination, when confirmed, becomes final and conclusive.*

"If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the

determination of the board. * * * After the hearing, the court shall enter a decree affirming or modifying the order of the board of control. * * *

"The determinations of the board of control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination."

(Water Law, secs. 26, 33.)

16. *Under the decisions of the Supreme Court of the State this purely administrative determination is prima facie correct; in other words, any one who questions it must affirmatively prove that it is wrong.*

"Their findings and orders are *prima facie* final and binding until changed in some proper proceeding."

In re Willow Creek, 74 Ore., 592, 610.

It would hardly seem necessary to make any argument to show the entire invalidity of such an attempt to determine property rights by administrative fiat. Under this act this purely administrative board, with admittedly no power to make a judicial adjudication of rights of property, is authorized to send out its assistants and employees and gather all kinds of data relating to the relative rights of various persons in and to the waters of a stream, and upon this *ex parte* data to make an ascertainment of the relative rights of the parties, and if a person wishes to even overcome this *ex parte* data he is required to appear before the board and assume the burden of proof of not only establishing his own claim, but disproving the claims of others, and this determination is immediately made effective and the officers of the State are empowered to physically enforce it by physically taking the water away from a person who has been thus "determined" not to own it, and it is made a misdemeanor to in any way prevent the enforcement of this

determination, and all courts are forbidden to issue any injunction enjoining its enforcement. In order to avoid the effect of this determination the owner must prosecute a judicial proceeding in the State or Federal courts, all of which might and probably would take several years, during which the owner would be deprived of the water which he had been thus illegally "determined" not to own, and not only that, but the determination would be *prima facie* correct, and therefore, if he attacks it he would not only have to establish his own rights, but would have to disprove the rights which have been adjudicated to others, and which he desired to dispute. Thus a mere administrative fiat, which may be based entirely, and must be based to a large extent, according to the very terms of the act, upon mere *ex parte* evidence and data, is made to work a complete deprivation of property for an indefinite period of time, and to raise a presumption of ownership which may convert it into a virtual final barrier to any relief whatever to the true owner. As we have already stated, it hardly seems necessary to argue the invalidity of such legislation, but as appellees seek to sustain it on several grounds, we shall briefly take up and discuss them:

1. It is contended that the cases permitting the regulation and control of property in which there is a common interest, such as oil and gas, justify this legislation.

2. It is claimed that the power of the State to establish rules of evidence authorizes it to make this administrative announcement *prima facie* evidence of ownership.

3. It is claimed that, owing to the nature of water and water rights, the police power is sufficient to authorize this legislation.

Before taking up in detail these three contentions, we would impress upon the court the fundamental consideration that

ANY DETERMINATION BASED UPON INFORMATION GATHERED IN AN INFORMAL MANNER WITHOUT AN OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE THE WITNESSES IS IN VIOLATION OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

In *Interstate Commerce Com. vs. Louisville & N. R. Co.*, 227 U. S., 89; 57 L. Ed., 431, this court said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (*Tang Tun vs. Edsell*, 223 U. S., 681; 56 L. Ed., 610; 32 Sup. Ct. Rep., 359; *Chin Yow vs. United States*, 208 U. S., 13; 52 L. Ed., 370; 28 Sup. Ct. Rep., 201; *Low Wah Suey vs. Backus*, 225 U. S., 468; 56 L. Ed., 1167; 32 Sup. Ct. Rep., 734; *Zakonaite vs. Wolf*, 226 U. S., 272; *ante*, 218; 33 Sup. Ct. Rep., 31), or if the facts found do not, as a matter of law, support the order made (*United States vs. Baltimore & O. S. W. R. Co.*, 226 U. S., 14; *ante*, 104; 33 Sup. Ct. Rep., 5; *Cf. Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission*,

206 U. S., 20; 51 L. Ed., 942; 27 Sup. Ct. Rep., 585; Wisconsin, M. & P. R. Co. *vs.* Jacobson, 179 U. S., 301; 45 L. Ed., 201; 21 Sup. Ct. Rep., 115; Washington *ex rel.* Oregon R. & Nav. Co. *vs.* Fairchild, 224 U. S., 510; 56 L. Ed., 863; 32 Sup. Ct. Rep., 535; Interstate Commerce Commission *vs.* Illinois C. R. Co., 215 U. S., 470; 54 L. Ed., 287; 30 Sup. Ct. Rep., 155; Southern P. Co. *vs.* Interstate Commerce Commission, 219 U. S., 433; 55 L. Ed., 283; 31 Sup. Ct. Rep., 288; Muser *vs.* Magone, 155 U. S., 247; 39 L. Ed., 137; 15 Sup. Ct. Rep., 77.) * * *

"The Government further insists that the commerce act (26 Stat. at L., 743; chap. 128 U. S. Comp. Stat. 1901, p. 3136) require the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body, and even where it acts in a quasijudicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Commission vs. Baird*, 194 U. S., 25; 48 L. Ed., 860; 24 Sup. Ct. Rep., 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be

considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *United States vs. Baltimore & O. S. W. R. Co.*, 226 U. S., 14; *ante*, 104; 33 Sup. Ct. Rep., 5."

In *United States vs. Baltimore, etc., R. Co.*, 226 U. S., 14, this court said:

"We remark that it is stated in the Commissioners' report that they base their conclusion more largely upon their own investigation than upon the testimony of witnesses. It would be a very strong proposition to say that the parties were bound in the higher court by a finding based on specific investigations made in the case without notice to them. See *Washington ex rel. Oregon R. & Nav. Co. vs. Fairchild*, 224 U. S., 510, 525; 56 L. Ed., 863, 868; 32 Sup. Ct. Rep., 535. Such an investigation is quite different from a view by a jury, taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record, and the facts thus noticed are specified, so that matters of law are saved."

In *Whitfield vs. Hanges*, 222 Fed., 745, 754, the action of an administrative officer in deporting an alien upon data gathered by him *ex parte* was annulled, the court saying:

"After the hearing the inspector made and forwarded his report and recommendation to the effect that the appellees were guilty of the charges, and that they should be deported. This report states the evidence on which it is founded, and discloses the fact

that it is based, not on the evidence at the hearing, but on the statements of the prostitutes extracted before the arrest, which are condensed and recited in the report, and on rumors and hearsay, which are set forth in the report, in support of which there was no evidence in the case, of which the accused had no notice and which he had no opportunity to refute by evidence or otherwise. For example, there was no evidence or mention before or at the hearing of these and many other statements in the report of the inspector regarding the witnesses for the accused:

"I was informed that witness J. C. Buchanan only served about four months on the police force altogether at different times; that he was discharged twice from the police force for inefficiency, and also discharged twice from the sheriff's office when he was serving as deputy, for overindulgence in liquor and inefficiency. * * * I was informed that A. M. L. Urdangen, who is a Jew, has a bad record from other towns where he has been located in business, and that the fire insurance companies would allow him little insurance because of his having had numerous fires.'

"Here is another statement unsupported by any evidence, and not mentioned at the trial, a statement illustrative of the basis of the finding and recommendation of the inspector:

"I inclose herewith a newspaper article taken from the Mason City Gazette of November 5, 1913, showing that the body of the murdered child of Ada Burgess has been removed from its burying place, and it is believed to be the work of Greeks, friends of Louis Chirikos. The police officers tell me they have had a great deal of trouble with the Greeks of Mason City."

"That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing. *Interstate Commerce Comm. vs. Louisville & Nashville R. R. Co.*, 227 U. S., 88, 93; 33 Sup. Ct. Rep., 185; 57 L. Ed., 431; *ex parte Petkos* (D. C.), 212 Fed., 275, 277, 278."

In *Stadtlander vs. The New York Edison Company*, Public Utility Rep., 1915B, 685, 688, it is said:

"I refrain from characterizing the portion of the amendment which says, in effect, that the Commission may take into account things not embraced in the allegations contained in the complaint, inasmuch as I cannot conceive of any Commission making a determination upon facts which the corporation affected has had no chance to controvert, and which are not contained in the record."

None of the Cases Based on the "Co-owner" Doctrine Hold That Ownership Can be Determined by an Administrative Board.

The case of *Ohio Oil Co. vs. Indiana*, 177 U. S., 190, simply holds that gas and oil is the common property of all owners of the surface overlying the reservoir, that each may drill and explore and extract it, but until extracted it was not the property of any particular person, and therefore the State may regulate the appropriation of it and protect the joint owners of it by forbidding the waste of it by letting the gas escape into the air or the oil run over the ground. To make the analogy between that case and this of any value, it would be necessary to uphold the doctrine that the legislature might confer on a merely administrative board power to determine the ownership of all the oil wells in Indiana, and that upon data gathered *ex parte*, and might empower an oil master to enforce this "determination" and make it a crime to interfere with its enforcement and forbid any injunction against its enforcement and leave the owner to overcome the *prima facie* effect of its determination through years of litigation in the courts, in the meantime permitting the oil and gas to be depleted by the persons who were "determined" to be the owners by this fly-by-night determination.

The case of *Lindsley vs. Natural Carbonic Gas Co.*, 220

U. S., 61, is to the same effect, except that it relates to carbonic acid gas in natural mineral springs derived from a common source of supply.

The case of *Hudson County Water Co. vs. McCarter*, 209 U. S., 349, is still further afield. That case simply holds that the State has power to insist that its own natural resources, such as water, shall not be taken outside of the State.

The Power to Establish Rules of Evidence Does Not Authorize the State to Make a Mere Administrative Fiat Prima Facie Evidence of Ownership.

In *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S., 61, this court, after recognizing the power of the legislature to declare rules of evidence and to make proof of certain facts *prima facie* evidence of some other fact, laid down this important limitation:

“save where they have been found to be merely arbitrary mandates, or to discriminate invidiously between different persons in substantially the same situation.”

In *Bailey vs. Alabama*, 219 U. S., 219; 55 L. Ed., 191; 31 Sup. Ct. Rep., 145, this court held unconstitutional the statute of Alabama making refusal to perform labor called for under a contract of employment, under which the employee has obtained money or property, *prima facie* evidence of an intent to defraud, and said:

“This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Fong Yue Ting vs. United States*, 149 U. S., 698, 749; 37 L. Ed., 905, 925; 13 Sup. Ct. Rep., 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be

prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams vs. New York*, 192 U. S., 585; 48 L. Ed., 575; 24 Sup. Ct. Rep., 372; *Mobile, J. & K. C. R. Co. vs. Turnipseed*, decided by this court December 19, 1910 (219 U. S., 35, *ante*, 78; 31 Sup. Ct. Rep., 136).

"The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice Lurton, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'

"In this class of cases where the entire subject-matter of the legislation is otherwise within State control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition

cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to prescribe."

In *Mobile, etc., Co. vs. Turnipseed*, 219 U. S., 35; 55 L. Ed., 43; 31 Sup. Ct. Rep., 136, the following limitation was placed upon the power of the State to make a certain fact *prima facie* evidence of some other fact:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

The fact on which a presumption is to rest must have some fair relation to or some natural connection with the fact to be proved, and the existence of the established fact must reasonably tend to raise an inference of the main fact.

People vs. McBride, 234 Ill., 146; 84 N. E., 865; 123 A. S. R., 82; 14 Ann. Cas., 994.

In *State vs. Beswick*, 13 R. I., 211, the following language is used:

"It will be observed that the statute makes proof of the facts mentioned in it not only evidence against the accused, but *prima facie* evidence of his guilt, so

that upon proof of them it is not only the right but the duty of the jury to convict, unless the presumption is rebutted by other evidence, though of course such other evidence may be elicited from the witnesses for the State as well as given by witnesses for the defendant. *Commonwealth vs. Pillsbury*, 12 Gray, 127. The question then is, whether a statute is constitutional which makes it the duty of a jury, empanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, or upon simple proof that the place is frequented by persons of notoriously bad or intemperate character, or upon proof that he has there the implements and appurtenances of a grog-shop or tippling-shop, without more, unless there be other evidence to rebut or control it.

"We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common-law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not 'be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land.' What is meant by 'the judgment of his peers' is the judgment of a jury, and certainly the accused does not have the judgment of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the General Assembly were to enact that if any person were generally reputed to be guilty of a murder it should be *prima facie* evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty

had been taken from him by the judgment of his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt.

"The provision is that the accused shall not be deprived of his life, liberty, or property 'unless by the judgment of his peers or the law of the land.' It may be argued that even if the accused does not have the judgment of his peers he is nevertheless convicted by 'the law of the land.' This phrase has a historical origin. It was borrowed from Magna Charta, and, as has been repeatedly decided, means the same as 'due process of law.' The question then is, whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to 'due process of law.'

"The answer to the question depends on the meaning of the phrases 'due process of law' and 'the law of the land.' The phrases have never received a perfectly satisfactory definition. One or the other of them occurs in all or nearly all the constitutions of the several States and in the Constitution of the United States, and it is well settled that the provisions in which they occur were intended to operate as limitations on the legislative power of the several States and of the United States. It follows, if the provision is a limitation of the legislative power, that a legislative enactment is not necessarily 'the law of the land,' even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily 'due process of law.' It is also settled that these provisions secure to every citizen, except in the matter of taxation, a judicial trial before he can be deprived of life, liberty, or property. The definition of 'due process of law,' given by Judge Edwards in *Westervelt vs. Gregg*, 12 N. Y., 202, 209,

is quoted by Judge Cooley in his work on Constitutional Limitations, 355, with approval, and is in our opinion not only concise, but very accurate. 'Due process of law undoubtedly means,' he says, 'in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty. 'This rule' said Judge Selden, in *The People vs. Toynbee*, 2 Park. Cr., 490, 526, 'will be found specifically incorporated into many of our State constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.' 'Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defense left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie imbedded in the phrase 'the law of the land.'"

**The Police Power is Not Sufficient to Justify an *ex Parte*
Legislative Determination of Property Rights.**

It may be freely admitted that water and water rights are of such a nature that they fall into a class as to which police regulations are proper and not unusual; for instance, laws passed to regulate the manner of appropriating and acquiring rights in water, laws preventing waste in the use thereof and matters of that kind, fall into the clear domain of police power. The public is also interested in seeing that titles to water are settled, as it is interested in seeing that titles to land are established, and may, therefore, provide in the one case as it has in the other for proceedings *in rem* for the establishment of title and compel all parties to assert their rights on pain of forfeiture, but the same argument applies as well to the case of land as to the case of water, and it can no more be contended that the legislature has power to permit an administrative *ex parte* determination of rights to water than it can provide for the same character of determination as to land. It might just as well be claimed that, since it was to the interest of the public that titles to land be established in Chicago and San Francisco after the destruction of the records in the great fires, therefore the legislature under the police power could provide for an administrative *ex parte* determination of such rights, and could provide that the same should immediately be in effect, and that the sheriff might physically enforce the determination by placing the party determined to be the owner in possession and by evicting the party thus determined not to be entitled to possession, making it a misdemeanor to re-enter, depriving him of the right to an injunction to hold possession, and making this determination *prima facie* evidence of ownership, thus compelling him, with all the records destroyed, to affirmatively establish a title of which he was theretofore in possession and enjoyment. Again, we say that no argument

should be necessary to overcome this contention, but it would be interesting to briefly refer to the cases relied upon by appellees to sustain it.

The cases cited are mostly from Colorado, and it is interesting to note that Colorado is one of the many western States which has steadfastly refused to adopt anything in the nature of an administrative ascertainment or determination of water rights, but has provided for the clearest kind of a judicial proceeding to establish those rights, and it is important to call attention to this for the purpose of disproving the contention that is made that this administrative determination is absolutely essential to the welfare of the western States. Colorado from its very earliest days has been most alive to the importance of water and water rights, has adhered strictly to the doctrine of appropriation, at the earliest date declared all of the water of the State to be the property of the State, and has always considered canal companies as mere public carriers, and the water appropriated by them as impressed with a public use; but notwithstanding this, it has provided at all times for a strictly judicial determination of water rights in a judicial proceeding *in rem* established for that purpose. With this understanding, let us refer briefly to the cases relied upon by appellees:

The first is *White vs. High Line, etc., Co.*, 22 Colo., 191; 43 Pac., 1028. In that case a contract had been made by a public service canal company with a consumer which practically gave the consumer control of his outlet ditch, and left him unrestrained in the amount of water which he might take. The court held that this was contrary to the legislation of the State, which from the earliest days provided that canal companies were mere carriers and impressed with a public trust and monopolies subject to regulation, and provided for keeping ditches in repair and required all canal companies to have their outlet ditches under the control of a superintendent and required them to each appoint a superintendent whose duty it should be to measure the water out of

the canal to the consumers. The court, however, made it plain that while such a contract was void or against public policy, this in no way affected any property rights of the parties, in the following language:

"The statute does not affect the right of plaintiff in error to receive whatever water he may justly be entitled to under his contract, but where, as here, there is a controversy as to the amount of such water available for his use, he must bring his action to determine such right and in no event can he be allowed to ignore the company's superintendent and its reasonable regulations, and, in violation of the statute, enlarge the outlet to his lateral ditch, and take water from the company's ditch at will."

In the case of *Fort Lyon C. Co. vs. Arkansas, etc., Co.*, 39 Colo., 332, relied upon by appellees, the only thing decided was that after there had been a judicial adjudication of water rights in one water district which affected water rights in another district persons not parties thereto must bring their action to have their rights established within four years, or they would be barred. In other words, the statute was upheld as a statute of limitations, prescribing a reasonable time within which a person must bring a suit.

The other case cited by appellees is *Commonwealth vs. Alger*, 61 Mass., 63, which only upholds the right of the State to establish harbor lines beyond which wharves shall not be extended.

These cases are all based upon well-recognized principles, which have nothing whatever to do with the proposition involved in this case, and as these are the only cases relied upon in support of the contention that the police power authorizes this legislation it is unnecessary to further discuss the matter.

The best test of the interpretation and effect of this statute is found in the manner in which it has been interpreted and enforced by the State Water Board.

I have before me photographic copies of the reports of the State Engineer and findings and determination of the State Water Board "in the matter of the determination of the relative rights to the waters of Chewaucan River and its tributaries, a tributary of Albert Lake." Those documents show in brief that, after the formal contests had been heard, argued, and submitted, and a few days before the final decree, the State Engineer made an *ex parte* report of data, largely of hearsay character, and that a "determination" was thereupon, without further hearing, entered by the Water Board almost entirely upon this *ex parte* data, which was used to entirely overthrow and destroy the formal evidence produced at the hearing.

The regular hearing of the contest was held in July, 1914, the matter was argued before the Water Board in May, 1915. At that time an application was made to reopen the case for further testimony, which was denied. On September 1, 1915, the State Engineer made a "report based upon testimony and briefs filed in the above-entitled cause and a personal inspection of conditions on the ground, accompanied by the two division superintendents, comprising the State Water Board." The report then details this *ex parte* examination, and among other things states:

"We were particularly fortunate in meeting Mr. E. R. Greenslet at Paisley. Since April 26th, Mr. Greenslet had been employed by the U. S. Department of Irrigation and Drainage Investigations of the Department of Agriculture, in making water investigations and tests and other practical tests and experiments with a view to determining the proper amount of water to be supplied for the production of crops on this type of soil. He was bringing this season's work to a close as water had been turned off

the marsh to facilitate haying operations. He accompanied members of the board on their various horse-back and automobile trips and gave us the benefit of the conclusions which he had reached as a result of the season's work."

Not even these conclusions, let alone the facts upon which they were based, are set forth in the report. The report then proceeds:

"The purpose of this report is to comply as fully as possible with section 6647, Lord's Oregon Laws, wherein the State Engineer is directed, 'To take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights' to the waters of Chewaucan River and its tributaries in Lake County, Oregon.'"

The report then proceeds to disregard the testimony as to the flow of the stream as given by the witnesses at the hearing and to substitute therefor an *ex parte* computation made by Fred F. Henshaw, District Engineer, U. S. Geological Survey in Portland.

As to the amount of water which must be permitted to drain off of irrigated lands, referred to as allowable waste, the testimony on the hearing is likewise abandoned, and for it is substituted the conclusions of one Don H. Bark,

"who for four years conducted hundreds of experiments in Idaho for the U. S. Department of Agriculture in co-operation with the State of Idaho. He states in paragraph twenty-five of his report," etc.

This report of the State Engineer was followed by another report by the State Engineer, dated December 6, 1915, in which the entire testimony of the principal expert witness of one of the parties was attempted to be destroyed by an alleged statement claimed to have been made by him before the American Society of Civil Engineers in November, 1915, or six months after his testimony. Thus the entire testi-

mony on the formal hearing is overcome by mere *ex parte* hearsay data. This last report was dated December 6, 1915, and on December 27, 1915, the Board, without a further hearing, made its "determination." This determination recites:

"Now on this 27th day of December, 1915, the above entitled matter, coming on before the State Water Board of Oregon, at an adjourned regular meeting of said Board, held on said day, and it appearing to said Board that all the evidence taken at the original hearing and in all contests has been filed in the office of said Board, *and that the State Engineer has made the investigations and examinations required by law, and that a certified copy of the report of said State Engineer is now on file herein*, and no further testimony or evidence, having been offered by the parties hereto, and all the testimony taken, exhibits filed, maps, measurements and other record evidence submitted by the claimants herein, *and by the State Engineer*, having been fully and carefully considered, the State Water Board now makes the following findings of fact."

The Board then proceeds to and does make findings of fact *in exact accord with the report of the State Engineer* and then makes its determination as follows:

"And the State Water Board being fully advised in the premises, it is hereby CONSIDERED AND ORDERED that the relative rights to the use of the waters of Chewaucan River and its tributaries be, and the same are hereby adjudicated, determined, and settled, in accordance with and as set out in the foregoing findings of fact and order of determination."

Conclusion.

In concluding this matter we respectfully submit that no argument advanced by appellees can justify the determination of important property rights as between private individuals by any mere administrative mandate. The domain of administrative power is a broad one, indeed, but, unless it be conceded that it has no limits, it must necessarily be concluded that the limit has at least been reached when an attempt is made under the police power to have important property rights of private individuals determined in a mere *ex parte* manner by purely administrative officers in a non-judicial proceeding.

We further submit that it is no fault of ours that the legislature of Oregon has seen fit to pass such an act. It is within the power of the State to establish a judicial proceeding *in rem* in which the relative rights of persons in and to the waters of the streams of the State can readily and constitutionally be adjudicated, as has been done in a great majority of western States.

Respectfully submitted,

EDWARD F. TREADWELL,
Solicitor for Appellant.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Of Counsel.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 300.

PACIFIC LIVE STOCK COMPANY, APPELLANT,

vs.

**JOHN H. LEWIS, JAMES T. CHINNOCK, AND GEORGE
T. COCHRAN, CONSTITUTING THE STATE WATER BOARD
FOR THE STATE OF OREGON, ET AL., APPELLEES.**

ORAL ARGUMENTS.

EDWARD F. TREADWELL,
For the Appellant,

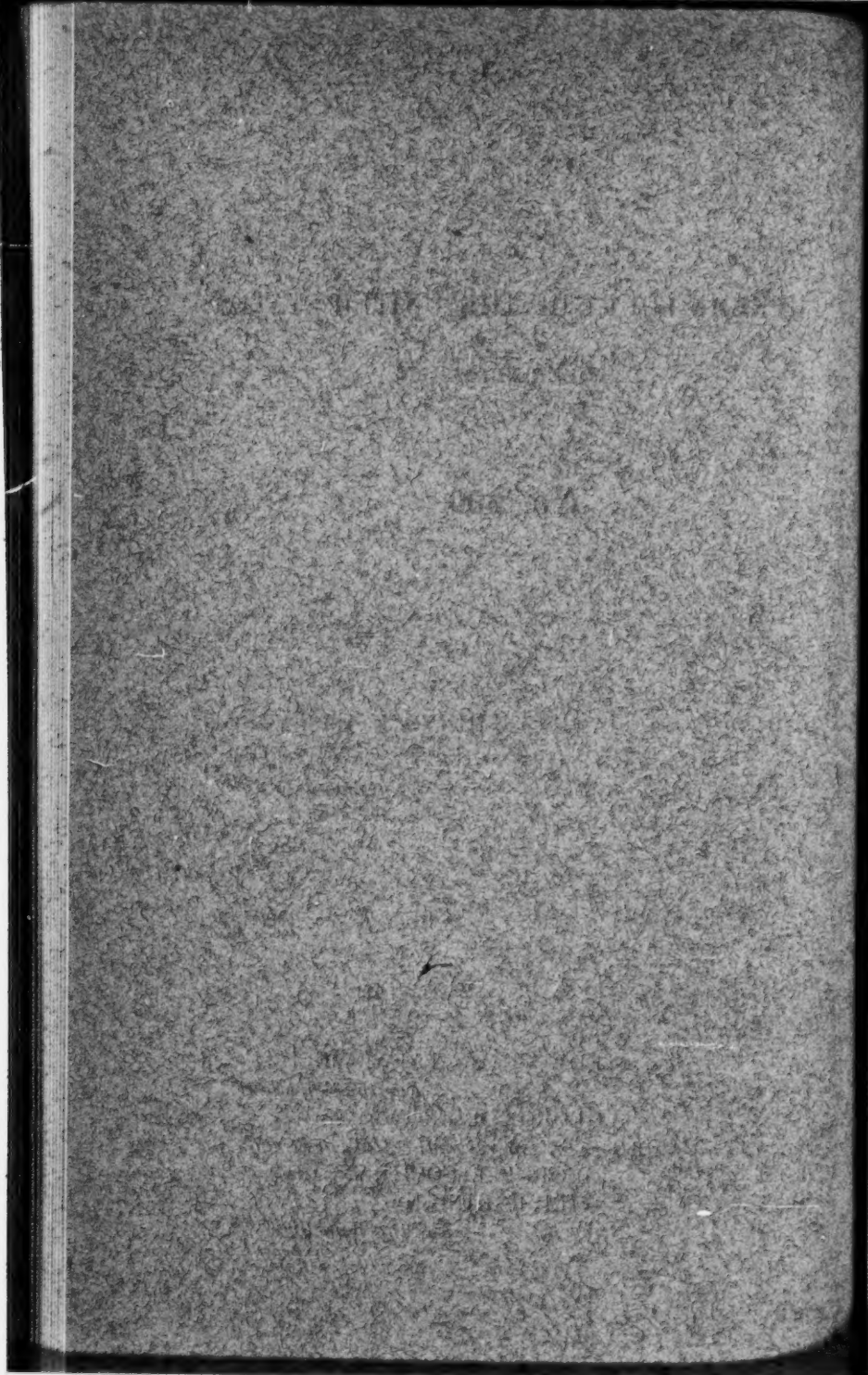
GEORGE M. BROWN,

Attorney General of the State of Oregon,

GEORGE T. COCHRAN, AND

WILL R. KING,

For the Appellees.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 300.

PACIFIC LIVE STOCK COMPANY, APPELLANT,

vs.

JOHN H. LEWIS, JAMES T. CHINNOCK, AND GEORGE
T. COCHRAN, CONSTITUTING THE STATE WATER BOARD
FOR THE STATE OF OREGON, ET AL., APPELLEES.

WASHINGTON, D. C., Thursday, March 16, 1916.

The above-entitled cause came on for argument at 1.15
o'clock p. m.

Appearances:

Edward F. Treadwell, Esq., for the Appellant.

George M. Brown, Attorney General of the State of
Oregon; George T. Cochran, Esq., and Will R. King, Esq.,
for the Appellees.

Opening Argument on Behalf of Appellant.

Mr. Treadwell: If your Honors please, this case comes
before this Court on direct appeal from a decree of the United

States District Court of the District of Oregon, dismissing a bill of complaint on a motion to dismiss, without any evidence—in other words, a demurrer, substantially.

The Chief Justice: Dismissing it on the ground of jurisdiction?

Mr. Treadwell: Want of merit.

It is conceded by both parties that the rights of the appellant, which are relied upon, are entirely under the Constitution of the United States, so that the only question presented here is whether or not the Bill of Complaint stated a cause of action under the Constitution of the United States.

I will say, if the Court please, that before stating the facts which are in issue in this case, I believe it would help the Court a great deal if I stated, in a few words, in a mere abstract way, the real question in issue in this case. In stating that, I wish to state that I base it not on some contention of the appellant, but I base it largely, if not entirely, upon the appellees' own statements in their brief in this Court, and their contentions in the lower court as to the facts and the law that are here applicable. With that understanding, I state the question in issue here in this way:

Is it competent for a State to authorize a purely administrative board, in a non-judicial and merely administrative proceeding, to make a determination of water rights, based largely upon *ex parte*, hearsay, non-oathbound testimony, collected without right of cross-examination, and which determination is in immediate effect and is to be enforced by the subordinate officials of the board by physically taking the water from those so determined not to own it, and giving it to those so determined to own it, and which determination it is made a misdemeanor to disobey, and the enforcement of which can not be enjoined; and which determination, as well as the *ex parte* data on which it is founded, in the only proceeding even claimed to be judicial, in which it may be reviewed, is made *prima facie* evidence of right and its correctness must be disproved by anyone questioning it.

The facts out of which that situation grows, your Honors, appear to be these: It appears that the complainant in this case, the appellant here, is the owner of a large tract of land in Oregon, irrigated by the waters of the Silvies River. It appears that there were pending in the United States Circuit Court of the State of Oregon suits brought by that company against certain people who, it was alleged, were about to divert practically all of the water of the river away from the complainant, and those cases were in issue in the federal court. While those cases were in issue, the State of Oregon passed a statute in the year 1909 which will here be referred to as the Water Law of the State of Oregon, and which I will review a little more in detail later on. At any rate, it is sufficient to say at this time that it created a board for the purpose of making the determination which I have recited in the question that I have propounded to this court.

Under these circumstances, a proceeding was commenced under that statute to determine the rights in and to the waters of this river, and this complainant, the appellant here, thereupon taking the position that it might be contended that it was a judicial proceeding which could lawfully and properly determine the rights of a private person as against or in favor of his neighbor, proceeded to remove it, and did remove it into the United States District Court for the District of Oregon.

The defendants came in, the same parties who appear before this court, and said that this proceeding is purely administrative—and the arguments which they made to show that it was administrative will be the arguments which I will impress upon your Honors in a few moments—that it was *ex parte*, that it was largely the gathering of data entirely outside of court by public officials, and that the determination was largely of what they called an administrative character; that it was not judicial in any sense of the word, and that therefore it could not, under any circumstances, be removed to the federal court.

The Chief Justice: The very parties now here raised that? Mr. Treadwell: Yes, your Honor; and I am making my argument on their argument.

This contention—and I make no criticism of it—was upheld by the United States District Court for the District of Oregon, holding that it was a purely administrative proceeding, and that therefore it could not be brought within the jurisdiction of the federal court.

After that decision, the complainant filed its bill of complaint. It alleged in that bill of complaint, in a general way, the facts that I have simply briefly suggested in my argument, and which your Honors can almost fill out in your minds, without my restating them; and it stated further in its bill of complaint that under this proceeding certain *ex parte* testimony would be gathered and taken by this board, and that the board considered it as *prima facie* evidence of the rights of the parties, and that unless this complainant came into that proceeding and affirmatively disproved the correctness of all of that *ex parte* data and the *ex parte* testimony gathered in the field by all of these parties, under a rule adopted by the defendant, it would allow those claims, although unfounded as against the complainant's claims, although they might be absolutely unquestioned.

It was further set forth in the bill of complaint that this country was the most inaccessible place in the United States—not disputed by anyone here—the furthest off from the railroad; that the complainant's own rights were gathered together over a period of thirty years from various people, water appropriators, who were scattered all over the western States, and that two hundred and four other people had filed these *ex parte* statements of their rights before this board; and that the board had adopted a rule that in order to disprove them or overcome them, we would have to take the affirmative, and affirmatively disprove their correctness.

Your Honors can imagine without any allegation what it would mean for a man to disprove the negative fact of the

appropriation of water which may have been alleged by this *ex parte* data to have occurred thirty or forty years ago.

It was alleged in the bill of complaint, and here stands as an admitted fact, and not an exaggerated fact either, that in order to bring those witnesses and disprove this mere *ex parte* data——

Mr. Justice Holmes: Will you state the proposition which you say you had to disprove?

Mr. Treadwell: To disprove the appropriation by two hundred and four separate people of water rights extending over a period of thirty or forty years.

We alleged in our bill, as I say, and it stands here as admitted, that in order for us to do that, in order for us to in any way protect ourselves, even before this administrative board, we would have to expend somewhere between \$38,000 and \$50,000.

It is unnecessary to review this Act of the legislature except in a very brief way, although it may not seem brief to your Honors. I assure you I will make it quite brief, because, as I say, most of the things that I am going to say as to this Act are either decided to be its meaning by the Supreme Court of the State of Oregon, or conceded and argued to be its meaning by counsel on the other side.

In the first place, the Act provides that any person interested in a stream may apply to this board to have the rights of the stream determined. It is provided that the Board shall thereupon give, by mail or publication, a notice of the time when they will begin "the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants."

As to the notice that they will proceed to take testimony, it is here admitted by the brief of the appellees that that does not mean that they notify the parties of the time when they may come together and there be examined and cross-examined and have their testimony formally taken, but it means—and they gloat, as it were, that that is what it

means—that they will go out at that time and begin taking *ex parte* statements, without the presence of anybody else to cross-examine or examine the witnesses; and in fact, they prepare a written form that the party is to fill out and hand to them at that time.

So far as the examination which is to be made, your Honors, and of which they give notice, of course in the nature of things all that means is that they give us notice that on a certain day the entire office force of engineers and others of this board will go into the country and will there commence gathering anywhere they see fit, any data that they see fit to gather respecting the rights of any party on that stream. Of course, in the nature of things, it is not contended that that is subject to any cross-examination or any examination or any control of any kind of the parties, but it simply means that they may travel through the country and go into this man's house and that man's house, and get not only what he says in support of his rights, but get anything that he can give to poison the board, against the rights of his neighbors. It means that they may gather data, *ex parte*, hearsay or otherwise, and that is not disputed on this hearing.

Mr. King: May I ask you a question?

Mr. Treadwell: Certainly.

Mr. King: Is there anything in that act that makes it a misdemeanor for not appearing to defend? •I understand you to make that statement.

Mr. Treadwell: I do not think that is the question——

Mr. King: (Interrupting.) I find it in the brief.

Mr. Treadwell: That is a long ways from my argument at the present moment.

Mr. King: I understood you to make that statement a few moments ago, and I understood it to be on the brief.

Mr. Treadwell: Since Mr. King has asked that question, I will answer it, that it is made a misdemeanor for any man to touch a drop of water that this board has determined that

he does not own, or a drop of water that it determines that another man owns. That is what I said, and I repeat it.

The Act goes on and proceeds to provide that these notices shall likewise be published, and providing "a similar notice setting forth the date when the State Engineer or his assistants will begin the examination of the stream and the ditches diverting water therefrom."

On this date, it is admitted by the argument, the board does go and *ex parte* take these *ex parte* statements of the various claimants. We also at this time will leave the State Engineer with his assistants going all through the country, entirely uncontrolled by anyone.

It is provided that when he has completed the taking of this testimony, which means simply these written *ex parte* statements, he shall then leave these open to inspection of all the parties, and notify them when they may examine that part of the *ex parte* testimony. It is provided also that if anybody wants to come in and put in their claim, they may put it in, but if they do they must immediately pay a sum of money, so much per acre on all his land. The Court will understand that if that is valid, there is no limit to its validity. Of course, if it can be one cent an acre, it can be fifteen cents an acre, or it can be thirty cents an acre, or one dollar an acre, or almost any other sum. At any rate, he is given that privilege, if he wants to come in and put in his claim in this same *ex parte* manner, that he may do so upon paying these sums.

It is then provided that any party may come in and contest the testimony or claim of anyone that has been made by this *ex parte* testimony, and on that contest, your Honors, there is no question but what any party may have an examination of witnesses in the ordinary way. There is no question made about that or any doubt about it under the Act.

It is provided that that is to be at the expense of the parties, the witnesses and fees to be taxed in the same way as in suits in equity. At any rate, it is alleged in the bill, and it is ad-

mitted here on the demurrer that the construction of that law is that this *ex parte* data, this *ex parte* testimony, is already *prima facie* evidence of the rights of the parties, and that therefore the contestant, if he does come into this administrative proceeding, and contest, has got the burden of proof of disproving the correctness of it.

I do not know what the counsel will say here. They may say that is not a correct interpretation of the Act. It is alleged in the bill that they themselves have adopted that as a rule of procedure of their board; so that, so far as we are concerned, it does not make any difference very much whether it be a correct interpretation or not. I will say that there are respectable authorities holding that where a person is said to be a contestant and is required to come in and contest a thing, that is considered as having some *prima facie* effect, he has the burden of proof and therefore that would be a proper interpretation of this Act. I think Mr. Justice McKenna may remember that in our State of California it is held that when a man comes in and contests a will which is simply filed as a purported will, he has the burden of proving that it is not a will and that it was not executed, and if he does not introduce the proof, the judgment goes against him and in favor of the will. I will simply pass that by saying that the bill allows that is their construction of it, and it is admitted by the

The Act provides that after the testimony on this contest is taken, the evidence in the original hearing before the Superintendent, which means all of the evidence taken and all of this *ex parte* evidence, shall be transmitted to the State Water Board. The next section picks up the State Engineer and his assistants, who in the meantime have been proceeding without any control and without any right of cross-examination, and says that he shall "take such other steps and gather such other data and information as may be essential to a proper understanding of the relative rights of the parties interested," which means that he can not only

examine the flow of the stream, the capacity of the ditches, the land that he thinks has been irrigated, but that he can gather the *ex parte* hearsay data as to the relative rights, which necessarily means and can only mean one thing, namely the right of priority, whether one is relatively better or worse than the other, or relatively earlier or later than his neighbor. This is likewise transmitted to the State Board of Control, or the State Water Board, without any opportunity of the parties ever seeing it or any provision that they ever shall see it.

What does it then provide? "As soon as practicable," which might be the next day, "after the compilation of said data and filing of said evidence," both *ex parte* and adversary, "the Board shall make a determination of the rights of the parties to that stream.

This court has very aptly said, your Honors, that the constitutionality of a statute is not to be determined so much on what is done under it as upon what can be done under it. It would be enlightening to your Honors, and I think entirely proper in my argument—if not, I do not want to say it—to state what the board has done under this Act as showing what can be done under it, because it works both ways.

I will state to your Honors that I have a photographic copy from the files of this board of a so-called determination in a proceeding involving another river, where the evidence was taken in the month of May one year in the so-called contest; where, in the next July, it was formally argued so far as the evidence on that contest was concerned, before the Board; and in the next December—I think on the sixth of December—the State Engineer signed—I do not know when he filed—a report containing the worst kind of hearsay, gathered not only from the State of Oregon, but from the adjoining State of Idaho, picked up everywhere as he rode horseback through that country; and within twenty days afterwards, without any opportunity to be heard or any hearing of any kind, they made a determination that follows

word for word this *ex parte* report of the State Engineer. I say that under this Act they could have made the determination five minutes or one minute after that *ex parte* data was filed. The Act then goes on to provide:

“The determination of the board shall be in full force and effect from the date of its entry in the records of the board.”

Just the moment it is entered and filed, it is in full force and effect. What does that mean? Your Honors reading that might be in some doubt as to exactly what it meant, and I might be in some doubt; but this Act leaves it in no doubt, for it goes on and provides that this board shall appoint any number of subordinates that it sees fit to appoint, and they shall take this determination and shall physically, by the strong arm of the State of Oregon, enforce it by taking the water away from the man that is determined by this determination not to own it, and give it to the man that they, in their wisdom, on this *ex parte* data and also on this testimony that is taken as I have detailed in these contests, have determined does own it—absolutely give it away in that fashion.

Not only that, your Honors—it is not only provided that they shall do that, but it is provided in regard to injunctions that such injunction “shall only be issued in case it can be shown at the hearing that the Water Master has failed to carry into effect the order of the Board of Control.”

So that it is not only to be enforced, but the power of any court to enjoin this officer of the State from enforcing it is taken away.

Not only that, but by Sections 43 and 44 it is provided that it is a misdemeanor to in any way interfere with its enforcement; that the Water Master may take absolute physical possession not only of your own property, your own gate, your own waterways, your own sluice boxes by which you have been diverting this water for years, but may put a padlock on them and shut them up, so you can not

take a drop of water, and it is a misdemeanor to open them. There is one section that is such a peculiar one that it will probably interest the Court to have it read:

"Any person who shall wilfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall wilfully use water or conduct water into or through his ditch which has been lawfully denied him by the Water Master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the Water Master or other competent authority shall be *prima facie* evidence of the guilt of the person using it."

So that it is first made a misdemeanor to wilfully use a thing that belongs to another, and then the mere fact that he does use anything that has been denied him by the State Water Board and the State Water Master, is immediately *prima facie* evidence of his guilt, involving every element that goes to make up guilt in a criminal case.

Your Honors will remember a case where an attempt by the state was made to make a thing *prima facie* evidence of guilt, and thus take away the right of the man's defense, which will be referred to a little later in argument.

So I say, your Honors, from the time that this administrative fiat is filed, it is in absolute force and effect, and results in an immediate deprivation of the property of the parties.

I wish now briefly to call attention to the only manner in which this may be reviewed by the court. It is provided that after the determination is made, a certified copy of it shall be filed in the State Court. There is no provision in the statute as to when this shall be done. Whether it be in a week or a month or a year or any time, is entirely blank in the statute; but I suppose the court possibly would hold that that meant within a reasonable time, so I do not put any particular force or effect on that. At any rate, it is a

fact that there is a direction that it shall be filed in the court.

It is also provided, however, that all of this original data, this *ex parte* data, hearsay data, non-oath-bound data, shall likewise be filed in the court; and the Supreme Court of the State of Oregon has decided two things, and those two things both being as to the construction of this statute, are just as much a part of it as if they were written in there originally by the legislature; so I simply refer to those as parts of this statute.

In the first place, they have said that the determination of the State Board is immediately *prima facie* evidence of rights. What does that mean, your Honors? It means the minute that thing is filed there, that piece of paper, that determination of this purely administrative board, that is in an absolutely non-judicial proceeding that cannot be brought within the jurisdiction of the courts in which a non-resident is entitled to have his rights determined, is *prima facie* evidence of right, and he therefore must disprove its correctness. In other words, it adjudicates those two hundred and four rights in priority to the complainant. The complainant has got to take the laboring oar and prove that they are not as they are determined to be. He has to prove that those people did not, thirty or forty or possibly fifty years ago, make the appropriations that, on this hearsay testimony, it has been determined were made by those parties.

Not only that, but the Supreme Court of the State of Oregon has held that this data, gathered *ex parte* by the State Engineer—consisting of maps, surveys or anything else that it may consist of—is *prima facie* evidence and *prima facie* correct. Think of it, your Honors!

Mr. Justice Pitney: That construction has been given to administrative matters in court in a great many instances. It is not an uncommon thing to say the findings of an administrative tribunal shall be *prima facie*. It is done under the Interstate Commerce Act.

Mr. Treadwell: I think, your Honors, I will make myself perfectly plain in my argument on that point—and of course that anticipates my argument just a little bit, but it is wise to take it up at this time,—that while in an administrative proceeding,—that is administrative in its essential features and its essential effect and purpose,—that is perfectly proper, it is largely discretionary with the legislature whether it will or will not give a person even a hearing in many such administrative proceedings, because they are in their essential nature really and in fact administrative. But, in a few moments, with your Honors' permission, I will show that while this thing is said to be administrative and not only has all the elements of administration, but has lots of things in it that are not deemed even proper in an up to date administrative proceeding, at the same time it is being given the effect of a judicial proceeding in that it takes away the immediate rights in property of a citizen. In other words, while they call it administrative, you cannot in a proceeding of that kind adjudge that A owns a piece of property and that B does not; that it is in absolute substance a matter that can only be determined in a proceeding that has the elements of due process of law. I wish to take that up a little further later on, but I wished Your Honors to understand the contention at this time.

So I say that not only the determination, but this *ex parte* evidence is made *prima facie* evidence of right in the Court.

One more suggestion in that connection is this: the appellees have not made themselves as clear on the question as to whether they deem the proceeding in court also administrative as they have on their contention that the proceedings before the State Board are administrative. Therefore, I do not undertake in this case to absolutely state what their contention is on that subject, but I will state two or three things in regard to it.

In the first place, I will read their own language, which I think means that it is still an administrative proceeding,

although it is in court. I will leave that to the Court because that would be more fair under the circumstances. I read from pages 105 and 106 of their brief:

"The constitution of Oregon differs very materially from that of Nevada. By Article VII, sec. 9, of the constitution of Oregon, the Circuit Court has the following jurisdiction:

"All judicial power, authority and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts, and they shall have appellate jurisdiction *and supervisory control* over the County Court, and all other inferior courts, *officers, and tribunals.*"

"Under this constitutional provision appeals may be taken from administrative boards or officers. Such appeals have been provided for from the earliest times."

They then cite five cases from the Supreme Court of the State of Oregon.

Not only that, Your Honors, but they say in their brief—and I do not entirely agree with them in this, but I do in a measure—that this law was borrowed from the State of Wyoming. I say that all that was distorted in the law of the State of Wyoming was borrowed and taken into the State of Oregon. If it be a fact, as they contend, that it was taken from the State of Wyoming, it is a well settled principle that it carries the construction of the Supreme Court of the State of Wyoming into the State of Oregon, and that has been determined in regard to these very water-right statutes. In the case of *Wiley vs. Decker*, 11 Wyoming, 496, and in another case in 13 Wyoming, 132, it is expressly held by the Supreme Court of Wyoming that the proceeding remains administrative, although it goes from a board, in which it was administrative, into a court that had judicial power.

Not only that, but there is additional evidence that it was not intended that real judicial weight should be given even

to the Circuit Court, although this is not at all clear, and my case does not depend on this at all, but I want to present the whole matter; and that is that this *ex parte* data, taken and put into court and given a *prima facie* effect, which is unknown to courts of justice, unless contradicted, becomes the basis of a decree. But, as I say, it is entirely immaterial to us in this case whether the entire proceeding in the Court of the State of Oregon is judicial, because we take these two positions:

First, that the Water Board's determination is put into immediate effect, results in an immediate deprivation of all of our property during an unlimited period of time, until it shall finally be determined by the courts of the State of Oregon, and in the meantime three years without water leaves a man practically without land, because it takes just about that length of time to destroy a man completely.

Second, that it is not giving due process of law to turn a man into a court or to bring a man into a court where his private rights as against his neighbor are to be determined and adjudicated, and have him bound to overcome a *prima facie* effect of *ex parte* non-oathbound, hearsay testimony, gathered without opportunity of cross-examination.

Third, we are deprived of due process of law in that it is provided that the mere administrative fiat as to the ownership of property shall be *prima facie* evidence of right, and the other party must overcome it.

I think, Your Honors, it would be of more assistance to you if I would first state to you the claims made by the appellees to sustain this law, because there might be some question about any arguments that I might propose; but if I give you the weakness of the grounds upon which it is sought to sustain this act, Your Honors will see how little the immense ability of all the counsel in this case was able to collect to sustain it.

They make three contentions in support of this extraordinary, as I think, piece of legislation. In the first place,

they say it is sustainable on the doctrine of cases decided by this court dealing with property in which there is a co-ownership. I think, if I am not mistaken, the decision which is typical of all of them on that subject, is *Ohio Oil Co. vs. Indiana*, a case in which the opinion was written by the Chief Justice of this court. They say in this case that oil in a reservoir, so to speak, under the ground, was held to be the common property, so to speak, of owners of the surface; that they had a right to explore for it and reduce it to possession, but until they did so they had no particular ownership in it; that it was a sort of common ownership in all of the owners of the surface above; and that on that account, and on account of the very peculiarity of its traveling from place to place, and the effect upon it of the gas and other things that cause it to travel, it was a thing in regard to which the State had a right to make certain rules under the police powers. It was so held in that case, and I do not see exactly why it should have been so seriously contended to the contrary, that under those peculiar circumstances, so carefully pointed out by this Court, it was proper for the State to regulate the manner in which that might be explored for and reduced to possession, so as to prevent its immediate waste and running into the atmosphere if it were gas, or running around the surface and being lost to beneficial use if it were oil.

In this case counsel say that water—and they are right in a way—originally was probably either the joint property of the land owners or the public property of the people, which ever way you want to put it—I do not have to stop to argue that—and that no rights were acquired in it that were not in the nature of joint rights in the same thing, or rather several rights in the same thing, and therefore had a community of interest, as it were, and therefore the police power is broad enough to regulate the manner of the use thereof, so as to prevent waste, etc. That is not disputed.

But to apply the decision in the oil case to this case it

would be necessary to concede just one proposition, and if this Court is willing to accede to that, I will accede to the applicability of these oil cases. If this Court is willing to hold that it is competent for the Legislature of the State of Indiana to provide that a mere administrative officer, in a mere administrative proceeding, on non-oathbound, hearsay testimony, may make a determination of the ownership and the title to all the oil and all the oil wells that have been reduced to private ownership in the State of Indiana, and that that is in immediate effect, to be enforced by the strong arm of the State of Indiana by taking it ruthlessly from the possession of the men that built the well and sunk the shaft and give it to another man who is determined thus to be the owner, and that it is a misdemeanor to prevent the Board from doing that, and that when you get into court even you cannot get an injunction, but you have to wait until through the process of time you may get a determination that this was all wrong, but if you do you have to overcome the *prima facie* effect of not only this determination, but this *ex parte* data—if this court is willing to hold that, then I am willing, as I say, to accede the applicability of those cases to the present case.

(Thereupon at 2:00 o'clock p. m. a recess was taken until 2:30 o'clock p. m., at which time the argument was resumed by Mr. Treadwell.)

Mr. Treadwell: The second point relied upon by the appellees to sustain this law is really the same, or substantially the same, as the one I have just considered, namely, that the police power is broad enough to justify this legislation. I want to say that there is no question of the applicability of the police power to the appropriation and beneficial use of water, but that is quite a different thing from saying that you can determine a man's rights in water and take them away from him without those ordinary safeguards that go to make up due process of law.

There is one matter in connection with this that I think is very proper to call attention to, namely: The State is interested, whether it be under the police power or any other power, to see that titles to water are settled and adjudicated and established, in the same way that it is interested in seeing that the title to land is settled and established and adjudicated and made a matter of record. To that extent I am perfectly willing to concede, and in fact to concur very strongly in the proposition that the State should establish some proper proceeding, and I believe a proceeding more or less in rem, for the purpose of establishing the water rights and the titles to them.

As this Court pointed out—and if this Court did not, I think our own court did—in passing upon the validity of the act that provided for the establishment of titles to land following the great fire in San Francisco, the State was interested in compelling, so to speak, every one to come in and assert his title, and therefore that the State had power to establish a proceeding in which the rights could be adjudicated, and in which it was the duty of every one to come in and assert his rights, if he had any.

I want to call Your Honors' attention that from the very first case that came before the court on that subject—I am not sure that that case of *Tyler vs. Judges* was the first case, but whether it was, or whether some other case was the first case that was before the court on that subject—the courts have uniformly held, that, notwithstanding it was a matter in which the public were interested, on the other hand it was also interested in seeing that it was only done by a judicial proceeding, and that it could not, in the nature of things, be done in a proceeding that was administrative in its nature and did not contain the basic elements of due process of law; and the many cases, or at least several cases attempting to establish title to land were held unconstitutional because that was attempted to be done in an administrative proceeding.

Mr. Justice Pitney: As I understand you, your point of contention is not that you have not due process of law in the outcome, in the event, of some kind, but that pending the judicial determination of it, your enjoyment of the water is taken away under the administrative determination?

Mr. Treadwell: That is my first contention, Your Honor; but I do not waive by any means the second contention; but they are entirely separate, of course.

Mr. Justice Pitney: You cited the case of oil and you now cite the case of land, and it strikes me there may be a difference owing to the nature of the property in water. Somebody has to enjoy this water in the meanwhile, pending judicial determination. Water is not like oil; oil can rest where it is, while water runs away to the sea. You can not store up water in that sense. Who will enjoy the use of the water rights pending the two or three years, or whatever the time may be, that it will take to come to a final determination of the question? Is it not competent for the State, in view of the evanescent character of the property to decide who shall enjoy it in the interim?

Mr. Treadwell: Of course, that is a very interesting suggestion.

The Chief Justice (interposing): Let me ask this question.

Mr. Treadwell: Very well, your Honor.

The Chief Justice: Take the doctrine of prior appropriation, which was established, I believe, in Colorado first in that western country. Suppose a case now, where at the mouth of a river, by prior appropriation, somebody acquired the use of so much water of that river as rendered it impossible for anybody virtually to make a beneficial use of any water in the river from its source to its mouth, running the long distances through that State and involving the prosperity and development of that entire people. Do you think that that prior appropriation is such a right of property, in view of its relation to the water and the relation of that

water to the people, that it would come within the shelter of the Constitution of the United States in the way you have suggested?

Mr. Treadwell: That is my contention—that it is just as much a right of property as anything could be. I would say there are two classes of water rights involved in this case and in most cases of this kind.

The Chief Justice: I have been thinking of this subject. At the time the doctrine of prior appropriation began its development—I think possibly in Colorado, though I may be mistaken about that, but somewhere in that inter-mountain country—the common law doctrine of the right of water to flow as it was wont to flow, and of each person along the stream to own, was very well established. My understanding is that the claim of property in that right was met by the contention that that right was one subordinate to the public interest and the public right to regulate, and it was upon that theory that this law of prior appropriation was maintained. If the prior appropriation wipes out other rights of property and absorbs them and causes them to disappear, it is a question whether the public interest in the changing conditions of men's affairs is such that it becomes necessary to hold that the community by some process may not change its right so as to meet the public conditions. That is the thought in my mind.

Mr. Treadwell: I would like to follow that just a word or two. Your Honor I know will not feel offended if we differ with you on the premise as well as on the conclusion.

I would say that in the various states, where the doctrine of appropriation was held to be the proper rule as against the old common law doctrine of riparian ownership, to which your Honor has referred, that was not reached by wiping out a property right, but it was reached by holding that in that particular state the common law never became a part of the law of the state on that subject, and on this theory—which your Honor has often decided, I think—

that the common law did not become a part of the law of this country in its entirety, but only so far as it was applicable to conditions. Therefore, the courts of each state took it upon themselves to determine whether or not the doctrine of riparian ownership was applicable to this country and was part of the common law which was adopted. Some states held that it was—notably California; and Oregon also held that the doctrine of riparian ownership did apply. Other states held that it did not apply at all; that the doctrine of prior appropriation, on account of our conditions was a necessary doctrine, and the other doctrine was never brought into the country. So you are not destroying any property right in adopting one or the other of those rules.

The Chief Justice: When you speak of your state, you are speaking of California?

Mr. Treadwell: I spoke of both in my statement, but in California they adopted the doctrine of riparian ownership in toto. In Oregon they adopted the riparian doctrine, and also provided that you could appropriate the surplus, so to speak. That is substantially the Oregon doctrine.

So I would simply say that there are too many cases in this country and too many cases by this Court holding that a right by appropriation is a property right and safeguarded by all the provisions of the Constitution of the United States, that it does not seem to me that it would be proper for me to follow the argument further on that subject, but to simply say that a water right—which, in this country, your Honors, is more important than the land itself, so to speak, because if you have a water right you can go and get another piece of land to put the water on, but if you have not got the water, your land is absolutely worthless—is a property right beyond any question. In Eastern Oregon, to say that that is not a property right which is protected by the Constitution, I would say would be a position that this Court never would take.

I therefore pass very briefly to the third contention made by the appellees in this case in support of this Act. They

say it is perfectly competent for the legislature, under its authority, to establish rules of evidence, to make any kind of an administrative determination *prima facie* evidence of right. That comes closely to the suggestion of Mr. Justice Pitney. This Court has had that subject before it on several occasions, and I think the clearest and at the same time the shortest statement of the rule is probably found in the case of *Mobile Company vs. Turnipseed*, 219 U. S., 35:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

We have cited in our brief the decisions of this Court that a mere arbitrary mandate of the legislature that a certain thing is to be *prima facie* evidence of something else that does not necessarily follow from it at all, is absolutely a deprivation of property without due process of law.

It simply comes to this, then, that without judicial sanctions that go to make up due process of law, an administrative board simply says, "This is so;" nothing to base it upon except the fact that they have said it, and then, having said it, they take your property indefinitely on that arbitrary mandate—and when I say "arbitrary mandate" I am using the language of this Court in the case of *Bailey vs. Alabama*, 219 U. S., 219. They make an arbitrary mandate that I do not own my property and that somebody else does own it, and then they proceed to say that I must overcome that.

To go back to the question of Mr. Justice Pitney as to what can be done pending a final determination as to the water rights, I will answer that that is an extremely important

proposition, but it is not one that the framework of our law have not met, thought of, and provided for. Any man may have a piece of property or may claim property that he does not own; and any man may try to get in possession of that to which he is not entitled; and the law gives a man various remedies and adequate remedies to meet that situation. If a man is in possession, there is more or less presumption in his favor; but if he is not in possession, he can sue to recover possession. If the other man is interfering with his possession, the courts of equity are open to any party to see that his right is protected by a preliminary injunction, that he can get immediately by going into a court of justice and putting up proper security, possibly, as the case may be, and getting the necessary relief that meets the case.

Take the case of oil: What could be more damaging than that a man who was not entitled to the oil should take it and use it and spend it and sell it, and get the money for it if he was not entitled to it? But would that be any reason for saying he was not entitled to the aid of a court or a judicial body before it was taken away from him? If the other party came in and even got a preliminary injunction—and a preliminary injunction is one of the extreme things in the law and not the ordinary thing that is due process of law; of course, it is due process of law, but one of the most extreme powers of the judicial arm of the government, that is not given lightly, even when it is asked for, but it is a remedy which the law gives to a man where he will be required possibly to give a bond or something of that kind. But to say that a man without any judicial hearing can have his property taken away from him because it is inconvenient, possibly, for someone else to find out whether he owns it, I say is not in accordance with what I understand to be the fundamental propositions of justice and due process of law.

If the Court please, I think that all of the difficulty which the Court may meet in this case will be found to be due to the entire misapprehension of the real nature of an adminis-

trative proceeding as distinguished from a judicial proceeding. An administrative proceeding, your Honors, is for the purpose of determining the conduct of some public official, and in those administrative proceedings, when he is determining his conduct under the law, he may do many things that look like judicial action; and I can imagine a case where he would even, under those circumstances, inquire into the ownership of property. We make no objection to that. If the State of Oregon desires to establish an administrative board for the purpose of statistics, for instance, or for the purpose of determining whether it will grant further appropriations of water—in other words, to determine what is in private ownership, so as to find whether there is anything more that may be put in private ownership—no one for a moment would object to that, and that would be administrative, although the officials in finding out what was in private ownership would more or less inquire as to what was in private ownership and what was in public ownership. But when they get through, their determination would be mere ascertainment, and that would be no more judicial process to determine ownership of property, than would the records of the Census Office in this great city. The Census officials go out and ascertain who owns the property and what a man owns for the purposes of the government; but to say that because they say a man owns a piece of property and determine in that way that he owns it, it is to be a judgment and to be enforced, is an entirely different thing.

This question has arisen in many states of the West. Counsel in their argument to you will try to make you believe that this law is in accordance with the laws of the western states. They will even try to make you believe that the welfare of the West is bound up in this law. What is the fact? The fact is, your Honors, that Colorado, one of the foremost states to recognize only the right of appropriation on the theory that water was life—Colorado, Idaho, North Dakota, New Mexico, South Dakota and Utah have

adopted proceedings *in rem* for the determination of water rights which are absolutely judicial in their character from the very start to the finish.

They have that same foundation that this Court put under the Torrens Law and under the McEnerny Act, real substantial proceedings of a judicial nature, which should be the foundation stone of adjudication when made, and the rights in that State have been determined in that manner, and in all these states I have mentioned, without any trouble of any kind. Other states have tried this administrative proposition, mixing it up. First, they started, which was perfectly proper, with a State Engineer who was directed to gather statistics, so to speak, to go out and publish statements as to what was the relative amount of water that was appropriated and unappropriated. That was a good law and there was no objection to it. Then some man, without any understanding of fundamental principles, attempts to take that law, providing an administrative proceeding for administrative purposes, and tries to turn it into one that determines, for the purpose of depriving a man of his property and giving it to someone else. That came up in South Dakota, and what did the Supreme Court there say? They immediately held it unconstitutional. They said:

"The right to use such waters cannot be thus confiscated or interfered with by the state or the public and placed in the custody or control of a State Engineer any more than could the land itself upon which such water happened to be. The rightful owners of riparian lands can not be thus deprived of or made to pay for a permit to use what under the law rightfully belongs to them."

They also there in that law, which was held invalid, as in this law, undertook to make the owner of a water right pay the expenses of this determination to get the water away from him. What did the Supreme Court say with reference to that? They said:

"It is also contended that Section 16 is void as tending to deprive individuals of property rights and property, by way of costs and expenses, without due process of law. We are also of the opinion that this contention is well taken. This section among other things provides that, when a suit to determine water rights has been filed, the court shall by order direct the State Engineer to make a complete hydrographic survey of said stream system, and that the costs and expenses thereof be apportioned pro rata among all the parties taking water from said stream in proportion to the amount of water allotted to each. It is a matter of common knowledge that there are many streams in this state, including the stream in question, where it would take many thousands of dollars to make such a survey. A riparian or other lawful appropriator lawfully using no more of the waters of said stream than justly entitled to could not be required without his consent to pay any portion of such expense without being deprived of his property without due process of law."

Of course he could, if there was a judicial proceeding provided for. If there was a judicial proceeding in court, of course a man holds his property subject to the burden of meeting, in a judicial proceeding, his title, and establishing it, and can be made to pay the cost of doing so; but to say that the man can be brought before a tribunal that cannot legally determine his rights, and make him pay the expenses of it, is what the court holds there can not legally be done.

They tried the same thing in Nevada. Did the Supreme Court of Nevada say it was necessary for the welfare of that State that its water rights should be thus determined and despoiled? No; they said they are property rights guaranteed by the Constitution, and this Act of the legislature of the State of Nevada was enjoined in a suit in equity identical with the suit here.

We refer your Honors to the case on our brief of *Knox vs. Kearney*, where they hold the law unconstitutional and among other things, they said:

"If any determination had prior thereto been made by the State Engineer as to water rights in the Muddy River District, they would not be such as would preclude the plaintiffs in this case from filing their action under the allegations therein set forth and securing a temporary injunction from an act of the Engineer which might unjustly deprive them of their vested rights."

They held that a bill in equity to enjoin the State Engineer from going ahead and attempting to make a determination of the vested rights was not demurrable; that is, that the demurrer to it was improperly sustained and should have been overruled.

Another case in the State of Nevada was that of *Andergon vs. Kearney*. There were three separate opinions filed in that case holding unconstitutional the law of the State of Nevada along those general lines. I naturally should not say that I agree with all three of those opinions. Your Honors will find much of interest in all of them. Probably they do not all state the law correctly. Probably all of them have a good deal of merit in them; but every one of them simply differed as to the extent of the unconstitutionality of that statute, and all of them concurred that a man who had a vested right in water was entitled to an injunction on a bill of equity against the State Engineer, enjoining him from interfering with it in any way, shape or manner. One judge said:

"The District Court is directed to modify the temporary injunction so as to only restrain the State Engineer from making determinations which would in any way impair vested rights."

The next one is a little too long to read, though I would like to read a few words from it, because it probably states the matter so much better than I can that I would like to leave it with the Court.

Mr. Justice McCarran contended that the act was wholly

and entirely unconstitutional—in other words, he went much further than I have to go in this case, and said:

"It is claimed that these sections, and the policy of the law generally merely confers upon the state engineer ministerial powers, and that even though the powers of the state engineer, as sought to be conferred, are quasi-judicial, the claimant is not deprived of due process of law inasmuch as the statute prescribes that he may appeal to the district court. These contentions, in my judgment, are untenable, * * * It is suggested that the provisions of these sections are only to confer upon the state engineer ministerial powers in order to carry out a scheme of water supervision and regulation. But, how can this be seriously contended for when by section 44 the final determination of the state engineer is termed 'a decree' and the proceeding is termed 'an adjudication and determination,' and the decree of the state engineer is by that section made conclusive as to the existing rights of the claimants upon the stream. Conclusive decrees made by a ministerial officer upon a matter involving the title and the right of possession to property—that subject with reference to which the fundamental law of this state declares 'the district courts of the several judicial districts of the state shall have original jurisdiction.'

"This last observation makes the provisions of the water law of 1913 even more drastic than its words imply, for it confers upon a ministerial officer powers of final determination on matters involving the right of the possession to property and fixes the only avenue of redress for a party aggrieved to a court, which, by constitutional prescription is precluded from assuming appellate jurisdiction. This provision of the water act of 1913 is a nullity. A law which is in conflict with the fundamental law of the state is not a law at all."

* * * * *

"Water being a property right and its enjoyment arising primarily on appropriation and priority, each of these elements is essential to the right under the doctrine of first in time, first in right. Yet if we give

to section 25 of the water law of 1913 the full meaning of the words there used, it is within the power of the state engineer, moreover, it is made mandatory, that the state engineer shall render a finding in case of the claimant who defaults in making proof, that the claimant, regardless of his actual priority, shall be given a later priority than that of others whose proofs were filed in accordance with the provisions of the act."

It is admitted by the bill of complaint that that is exactly what the act here provides for, and it does provide for it in so many words. In other words, the act here provides that anybody that does not come under this proceeding shall absolutely and forever be estopped from asserting any rights to the water of the stream whatever.

The court there further said.

"The very acme of severity, if not absurdity, is reached by section 25 wherein it is prescribed that any person who shall fail to appear and make proof of his claim or right in and to the waters of a stream system, as required by this act, prior to the expiration of the period fixed by the state engineer during which proof may be filed, shall be deemed guilty of a misdemeanor, and, if an individual person, shall be punished by a fine of not less than \$250 and not exceeding \$1000, or by imprisonment in the county jail for a term of not exceeding six months, or by both such fine and imprisonment, in the discretion of the court. Section 25 as it stands reads that a defaulting claimant shall be divested of his property rights, and moreover he shall be subjected to the indignity of a fine or imprisonment for having given up that right. It has been said by a learned text-writer on the subject of water rights in western states that the laws of Wyoming were adopted in part from the laws of Italy and India. This provision, although not found in the statutes of Wyoming, may have been taken from the laws of India, but we find no sanction for such provision in a government such as ours."

Here we have the water law of Oregon that says, "If you do not come in and put in your *ex parte* proofs and claims before this board, you will forever be barred and estopped. If you do come in, you have got to pay an arbitrary charge in money for coming in, and then you have got to take the burden of overcoming every like claimant that has filed a claim," and then the matter is determined largely, as I have pointed out, on mere *ex parte* data, and that is put into immediate execution. Still quoting from *Anderson vs. Kearney*, this language is very appropriate to this case:

"The determination of individual rights upon a river system must not be confused with the determination of relative rights. The determination of relative rights in this instance is one affecting the rights of one individual as against another or a number of others, while the determination of individual rights is one which does not correlate the comparative rights of any other person. The latter might properly be said to be essential under a system of state control in order that the controlling power might supervise and determine the availability of future appropriations, but the former has no place in the contemplation of such a system, but belongs primarily to the courts."

So I say that an administrative determination for the purpose of determining whether or not other appropriations shall be permitted, is properly termed an administrative proceeding, is proper under all rules of police power; but when it comes to determining whether or not one man owns a certain thing or another man owns it, as between those two men, and when it comes to taking the arm and force of the government and taking that thing away from one who has it and giving it to one whom the administrative board believes is entitled to it, I say they are simply invading the power of the judiciary.

I do not want to be misunderstood on that. It is perfectly competent for the state to create a peculiar tribunal and call it a board or whatever they choose, provided it has the essential features of due process of law and does have

jurisdiction to make a determination. I do not care what you call it provided it is judicial in its means and in its effect; but I say that it does not make any difference whether it is a power given to a court or given to a board, if it attempts to make an adjudication or determination which is to be enforced and which cannot be opposed, and based, as this one is, on *ex parte*, hearsay testimony, merely an administrative proceeding, it is depriving the owner of due process of law.

If the Court please, I take it that I have probably taken more time than I should, and probably the last point to which I wish to call the Court's attention does not need really to be called to the attention of this Court. But in view of the prevalence of the creation of administrative boards, it is very proper, I think, that this matter should be called to the attention of the Court.

Any determination in a judicial proceeding or in any other kind of a proceeding that attempts to take a man's property from him and determine the right to property, which is based on data gathered without the presence of the parties and the right to cross examine, gathered out in the field, lacks the fundamental principles of due process of law. I wish to say that while that is not true in a proceeding that is administrative purely and actually administrative in its character and which does not involve property rights, still every enlightened legislature, and every court construing enlightened legislation holds that even in those cases a hearing should be given, and that a finding based on matters gathered in that way is improper even in that character of proceeding.

This Court, in the case of *Interstate Commerce Commission vs. Louisville and Nashville Railroad Company*, 227 U. S., 89, called attention to the fact that the statute creating that Commission gave them power and proper power to go out and gather here and there and everywhere any data that they might wish, *ex parte*, and without any opportunity for cross-examination or anything of that kind; but it said that

that could not in any way be used in any proceeding where, under the statute itself, a party was entitled to a hearing. Why? It says the party is not getting a hearing if the data is being gathered without his presence, without the right to cross-examine, without the right to explain, without the right to disprove. He is not getting a hearing under those circumstances; so this Court held in that case that in a proceeding that was legislative or administrative—and I take those words as being substantially or largely the same—that it at any rate was legislative or administrative, and therefore was not governed by the due process of law provision; and still the court held he was not being given a hearing under the statutory provisions of the Act creating the Interstate Commerce Commission if that kind of data were used.

In any case where a man is entitled to a hearing under the due process clause,—and of course a man is before his property is taken away from him—this Court has time and again held that such data is absolutely of no effect, and that an adjudication made on it deprived him of his property without due process of law. That was held in *United States vs. Baltimore, etc., R. Co.*, 226 U. S. 14, and it was held again in *Whitfield vs. Hanges*, 222 Fed. 745. The Court there said:

“That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing.”

Still this board, after this hearing in the Chewaucan case, months after the argument on the matter, filed a report containing hearsay, *ex parte* data, gathered from all kinds of places, and on that an adjudication was made. I say, your Honors, that a law that permits such a thing to be done simply deprives one of his property without the fundamental protection of the Constitution, and I respectfully submit that in the West no property is more entitled to that protection than water.

**Argument of George M. Brown, Attorney General of the
State of Oregon, on Behalf of the Appellees.**

Mr. Brown: May it please the Court, with the permission of Mr. Treadwell, counsel for appellant, and without extending the length of time for argument, the appellees would like to be represented here by three counsel.

The Chief Justice: Very well.

Mr. Brown: This water law is of importance to the arid west. Take my own state of Oregon, which consists of nearly 100,000 square miles. Two-thirds of it is arid. The eastern and western portions of the state of Oregon are divided by the Cascade Mountains. The western portion is humid. Upon the eastern portion, at the foot of the Blue Mountains and along the Columbia River, they raise without irrigation crops of wheat and oats and barley. However, upon the great plains of central Oregon water is necessary, and its value is now being realized.

Oregon is comparatively an old state when compared with other western states. Our constitution was formed in 1857. We were admitted into the Union in 1859. Nothing concerning water was said in our constitution. In fact, at the constitutional convention, consisting of sixty members, fifty-nine were from humid Oregon, and only one, if I remember correctly, was from eastern Oregon. Since that time, however, and particularly since Federal legislation, since the Carey Act was adopted, the necessities for conserving the water supply in Oregon have been thought about, and legislation has been adopted concerning that matter. This piece of legislation, as said by the Supreme Court of the State of Oregon in the case of *Cookingham vs. Lewis*, referred to in our brief, gives a history of the water legislation in our state.

More than twenty years ago the Congress of the United States enacted into law what is commonly known as the

Carey Act. It has been amended two or three times since that time. The legislature of the state of Oregon in 1901 enacted a law accepting the terms of the Carey Act, and again in 1905. Again, there was a conservation committee organized in the state of Oregon. Later they received legislative sanction in 1909, and a law was framed or suggested by this committee that was adopted by the legislature; and it is often suspected in Oregon, and particularly by a person who appears before you here, that Judge King, co-counsel here, drafted a good portion of this act that now is being assaulted by my worthy friend from California.

I want briefly to illustrate to the Court the workings of the water law. Probably I can accomplish more for the benefit of the law by doing that than by quoting judicial decisions.

As a legal officer of the state of Oregon I am an ex-officio member of the Desert Land Board—not this Water Board, but the Desert Land Board. That board was created, or rather re-created, in 1909, at the date that our legislature established the Water Board. The reason and the necessity of establishing the Water Board is to ascertain the title of the water. We have there now, from the Deschutes River, in eastern Oregon, a project that is now being reclaimed under the Carey Act. The Carey Act makes the state the agent for the purposes of the reclamation. In other words, the land is turned over to the state. The state contracts with the promoter, the contractor, for the purposes of the reclamation, or the state can itself reclaim the land. Upon the Deschutes River there is a company known as the Central Oregon Irrigation Company. It is the duty of the state to ascertain, before entering into a contract with this company for the purposes of reclaiming large tracts of land, just what the situation is; that we ask the Secretary of the Interior to set apart, to know whether or not there is sufficient water left unappropriated in the Deschutes River for the purpose of entering into this contract, or otherwise, in order to pro-

tect—who? The settlers upon the land. There have been prices fixed upon the land for which it shall be sold. It is sold in tracts of forty or sixty or eighty acres, and up to one hundred and sixty acres. The settlers now must reclaim that, must grub off the sage brush, and in the lava district, three or four or five thousand feet above the sea, along the Deschutes River, along the eastern part of the Cascade Mountains, they even have to grub off lava rock. Taking some of the land, for instance an eighty acre tract, you will find perhaps forty acres of it irrigable, and it will raise alfalfa and the other grasses by means of irrigation. The settler does not do that in a day nor a month nor a year, but in the course of time, and in the course of years, he develops his home there and builds his house.

Then the question comes finally, after the settler has done this, after he has paid for his land, what title has he to his water? That brings this matter up before this board, to adjust these questions, to say what right, for instance, the Pacific Live Stock Company might have in the Silvies River, or what right any other company might have to its waters; to see whether or not, when these settlers do pay for their land, whether they have these rights; and when they have acquired these rights, whether they have gotten anything for their money. Have they the water that they expected to get? Is the water there to reclaim the land?

One of the latest things that occurred to me in my office, before leaving for Washington, was an application from the southeastern corner of the state of Oregon, adjoining Nevada, from the Sheridan Valley. A part of the waters now in Sheridan Valley have already been appropriated—that is, from Sheridan Creek. A person wants to get a tract of land, wants to get a contract under the terms of the Carey Act, and goes to the State Land Board, and they apply to the Secretary of the Interior to set off some land for the purposes of reclamation, land that now grows sage brush, jack rabbits and cactus. With this water, they can handle that land

profitably, and raise some of the most profitable crops on earth by means of this reclamation scheme.

Before it is right for the Desert Land Board to enter into a contract for the purpose of reclaiming this, before it is right to permit this land to be sold to settlers in forty or sixty or eighty or one hundred and sixty acre tracts, it is desirable and necessary to know what they have and to know whether or not the water is there in the way that it can be furnished; that when they pay for it they will have title to it, or does it all belong to a cattle company or to other persons who have already appropriated it? The only way to get at it is to investigate the title and to know exactly what they have.

Therefore, we claim it is a matter of public necessity or public concern or a matter of common welfare, and comes under the police power of this country. I am not going to undertake to define the police power, because this court has defined it so many times. In fact, just the other day this court issued its fiat which defined the police power of the state and effectually put out of business a concern that should have been put out of business many many years ago.

Our court has defined similar acts of this kind. I want to read from our own court first in order to show why we adopted this legislation in our state. At page 194 of our brief I quote from *Cookingham vs. Lewis*, which I just cited, as follows:

"In the report of the Commission to the Governor of date November, 1908—"

Our legislature met and enacted this law in 1909—

"—as to the conditions and possibilities under consideration, which is exhaustive on that subject, the defects of the former methods of acquiring water are set forth and the undertaking contemplated by the Commission outlined; namely, to conserve the surplus waters, as well as to settle and make definite water rights already existing as the only means of reclaiming arid lands of the State under the Carey

Act (see pp. 66, 71 and 73 of the report), under the control of the State in a manner not possible by private efforts alone. It is stated by the Commission, at page 89 of the report, that 'the desired laws (as to reclamation) can now be framed in harmony with the proposed legislation on the subject of water rights, which should be and is the necessary foundation of reclamation by the State.' That statement shows that these laws were intended to be dependent upon each other, and to constitute a state system of water title as a basis of sale to arid land owners or to settlers upon such land. The grant of the Carey Act is upon the proviso that the State will assume the responsibility of reclamation, which includes the procuring of water therefor."

That is what Congress thought and that is what the legislature of the state of Oregon thought, and in order to procure water, therefore, we have to know something about who owns these waters, and that is what we are trying to do out there in the west. In fact, our Water Board, notwithstanding it has been assailed by eloquent counsel, has accomplished a great deal of good work. We thought it was only proper, in preparing this brief, to take from the official records a little further quotation showing something, for instance, that they had done toward investigating water titles in the state of Oregon.

Mr. Kinney, in his work on Water Rights, said:

"The power of a state legislature to enact laws for state control and for the government of the waters flowing within its boundaries and the regulation of their use is unquestioned. This comes strictly within the police power of the state, which is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life. Relative to the use of the waters flowing within the boundaries of a certain state, this police power has the authority to establish such rules of good conduct, which

are calculated to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own, so far as reasonably consistent with the corresponding enjoyment by others of their rights. Whatever right one has, even in his own, is subject to that well-established principle that his use shall not be injurious to the similar rights of others. Such being the law as to private rights, to a much greater extent does the police power of a state apply to rights which are public, as is the case of the water within its boundaries, the right to the use of which is common to a large portion of the community. And, in this respect, it is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested."

Everybody in Oregon is interested in the application of the waters of the arid portion of the state to the lands.

I am not going to read this brief, but there are just one or two points which I want to emphasize on account of the knowledge of the person who was writing here by the name of Mead. Mead, in his Work on Irrigation, says:

"The lesson of these years is that the vital agricultural problem of the arid west is to establish just and stable titles to water and provide for their efficient protection in times of need. Every farmer in this region comes to understand the overshadowing importance of water. Their farms extend along many rivers for scores and even hundreds of miles. Every irrigator from a stream is bound to his fellow-irrigators by their common tie of dependence upon it. The amount diverted by one ditch is a matter of concern to all other ditches below, because it affects the volume remaining for their use. The independent life of the farmer in humid lands is impossible. Irrigated agriculture is an organized industry, and the prosperity and happiness of those engaged in it are largely determined by the character of its institutions."

He says further:

"The filing of these claims does not give complete title to water. In all of the states, except Wyoming, Nebraska, and Nevada, this has to be established by litigation in the courts. Sometimes these lawsuits take the form of injunctions, sometimes equitable actions to determine the respective rights of appropriators or to quiet their titles. But whatever their form, they all have one thing in common: they are waged as though the issue were purely a private matter, and the disposal of the rains and snows that make streams were something in which the public had no concern. There is no disinterested or public measurement of the ditches and streams or of the lands irrigated."

That is what is important and all-important in the adjusting these water rights by a board that is entirely free and without bias. It is like an investigation by an unbiased grand jury, or like an investigation by experts that are appointed by the court. Any person who has had a great deal of *nisi prius* experience in knowing of the ability of experts that are simply employed by the parties interested, knows the lack of high value sometimes of experts' opinions. But here now is an expert engineer, without any interest to serve but that of the public and that of the state, who goes out to gather data, to measure the extent of water that is being furnished, say, by the Silvies River, and to consider its sources, etc. He is serving the public and the Water Board; and the court, when this report finally reaches there, is better advised than if the parties in a lawsuit had each hired their own engineers.

They talk about the unfairness of this board——

The Chief Justice (interposing): No, I did not understand them to say that. I did not understand them to speak of unfairness.

Mr. Brown: That Chewaucan matter did not have anything to do with it. The presumption is that even officers

out in Oregon do their duty. We are a long ways west, but we do the best we can.

Let me now refer to the Silvies River matter. There are many people there who are poor. I want to say to you that this law is in the interest of the man with a home and the man with property, and every person who is interested in the whole public welfare. Many people of Oregon cannot afford to hire a lawyer. Many people in Oregon cannot afford to get into court at a great expense to litigate these water rights. You may take the location of the Silvies River, in Harney Valley in Central Oregon, a good country that has been occupied for a great many years, and in the vicinity of the Silvies River you will find hay land; in fact, we quote from Mr. Newell, the government engineer, in describing that country. We quote from him in our brief in his description of the Silvies River itself.

As the record shows, one of the water users files an application with the board, asking the board to determine the relative rights in the water that flows in the Silvies River. The board is not compelled to make the order; but it can consider the petition, and if the engineer and the board conclude then that it is their duty, in serving the public, to make this investigation, they do so. They go to the source; they conduct this investigation, of course lawfully. But suppose, after he has measured the flow of streams, after they have inquired and ascertained what those different persons are entitled to, as in this case where we have two hundred and four interested parties including the Pacific Live Stock Company; and suppose the Pacific Live Stock Company is found to be entitled to half of the waters. Suppose then that some other of these companies are entitled to ten per cent, and that some of the settlers are entitled to only a small flow. That report is made up and is filed in the circuit court. That is an administrative proceeding thus far, and that is what our Supreme Court says; but not as counsel would argue. When it is filed in court it is no

longer an administrative proceeding, because the act says it is then to be tried as a suit of equity. If these people or any of them, whether the appellant in this case or any others, are not satisfied, for instance, with the report made by the board or made by the engineer, they file exceptions to the report in the circuit court, and it is heard there by the court as a judicial proceeding.

Again, something has been said about injunction, that you could not get any injunction here in event the board was wrong, etc. The act itself provides that they may immediately get an injunction. All you have to do is file your bond, which stays any proceeding by the board in awarding the waters under the findings of the board. Counsel in his argument here would indicate that some great injustice would be done to some person who was interested in the water, and he could not receive any relief; but all he has to do is to file his bond.

Again, they say it is an *ex parte* hearing. We have that in our grand jury proceedings. Is it not true that a grand jury proceeding, which is conducted fairly, is *ex parte*? The defendant is not tried before the grand jury, and is not represented by counsel before the grand jury. Is it not fair? And yet you can put a man into jail upon indictment by a grand jury because, for the purpose of bail, it is presumed to be *prima facie* correct.

The Chief Justice: I thought a man was presumed to be innocent until he was proven guilty after the grand jury had indicted him?

Mr. Brown: For the purposes of bail. I will admit when he is put on trial he is presumed to be innocent, but when he comes, for instance, for the purpose of applying for bail, the indictment is *prima facie* correct; but after he is arraigned in court and enters his plea, it is true we have to prove he is guilty beyond a reasonable doubt.

Reference has been made to these removal proceedings. They claim that they have a right to remove. We argue

that these proceedings are not removable, because this is not a suit nor an action at law. It is merely an administrative proceeding. The right to remove is a right given by Federal Statute, but there is not right to remove in a proceeding of this kind. In their own brief they cite a case which, it seems to me, is in point. It is *Company vs. Patterson*, decided by this court several years ago, and reported in about 105 U. S. In that case they were condemning an island in the upper portion of the Mississippi River. Under the proceeding in the State of Minnesota, they filed an application in the district court and commissioners were appointed to assess the value, and they filed the report in the district court. If either the plaintiff or the defendant were dissatisfied, they had a right to have that tried by appealing, and the persons who were the owners of the land were known as the plaintiff and the company as the defendant. That case was tried. It was removed to the federal court, and on the question of removal—it is a case this court decided many times—this court held it was competent, because after that report had been made and filed in the district court, it was then a proceeding in court.

So in this case, after the report had been made by the board and by the engineer, if then the question of removal came up, it probably would be removable if the case were such a case as is otherwise removable; but in this case we claim it was a severable controversy; in other words, they seek to remove as the Pacific Live Stock Company against three of the defendants—that is, three of the defendants in the same suits that they had had, but not defendants in these proceedings, because you might say they were all defendants—not antagonistic parties necessarily, but because the proceedings were being conducted by the state. The petitioner is not the plaintiff, because it says the person who requests this must be a water user, and nowhere is he known as the person who is prosecuting the case or conducting it. The board itself conducts it, and if there is no plaintiff at

all, it is the state or the board acting for and on behalf of the state.

So then, as between the appellant in this case, and the Harney Valley Company or the Silvies River Company or the other companies mentioned, it is not severable, it is not between different parties. If they could remove the case at all, if this is a case that is removable from the board to the federal court, they surely would have to remove the entire case, for then it cannot be separated. This court, I think, made that plain in the removal causes tried here from some railroad commission's report, in about the 115 U. S.

Again, in this case the state is a party. You cannot remove where the state is a party in a case of this kind.

I will not consume more time in this matter except that I want to call the court's attention to what our court has said in reference to the water rights, and then I am through:

"For the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters."

As this court said in 218 U. S., in speaking of this Wyoming law—it is a case that came from another court to you, but I will illustrate by referring to it—

"It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bears a peculiar resemblance to legislative provisions enacted in some of the states where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See Part IV, *Wiel's Water Rights in the Western States*, 2d edition, pp. 590 *et seq.* The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Investment Company vs. Carpenter*, 9 Wyo. 110, 'to be found in the inability of the ordinary procedure and processes of the law

to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water.' "

So then, in behalf of the police power and in behalf of good neighborhood and seeing that all the people get their rights, and in the least expensive method, the people of Oregon adopted this water code.

Argument of George T. Cochran, Esq., on Behalf of the Appellees.

Mr. Cochran: May it please the Court, the condition which existed at the time of the adoption of the water code was one of chaos so far as water titles were concerned. Very few of those water titles were based upon any record whatever, and a great majority of them were based entirely upon parole testimony. I presume the condition of these water titles was similar to the condition of the land titles which existed in the state of California at the time that territory was annexed to the United States. The land titles of that territory were not known by the government of the United States. They were based a great deal upon documentary evidence held entirely by the land owner. At that time the United States Government passed an act appointing a land commission, and that commission proceeded to California and there, under that statute, proceeded to determine the land titles of those people. That statute made it the duty of land owners of that territory to present their claims to that commission, with their documentary evidence, on pain of them being forfeited. So here we have the presentation of their water right titles to this board, perhaps on pain of them being forfeited.

Furthermore, when that commission made its finding as regards those land titles in California, they reported their findings to the United States Circuit Court, and that court confirmed or modified those findings so as to confirm or do away with the claims of the parties for that land. All that was sustained by Mr. Justice Field on circuit in the case of *United States vs. Throckmorton*, reported in 4 Sawyer.

The Chief Justice: In that case were the facts found by the Board of Land Commissioners?

Mr. Cochran: I understand the facts were found by the Board of Land Commissioners, yes, Your Honor.

The Chief Justice: Were they conclusive on the party or *prima facie*, or was the question passed upon in the light of those facts?

Mr. Cochran: The land owner could file exceptions before the United States Court, which in itself, under the statute, operated as an appeal to that court. Then those exceptions were tried out, but finally that act was amended so that the United States District Attorney for that district could also file exceptions to the findings of the board.

The Chief Justice: I understand your opponent to claim here—I am only trying to bring out the situation—that under this statute he is in a large measure concluded by that report, and if he goes into court to question it, it is made *prima facie* conclusive on him. Is that the case with the California land situation?

Mr. Cochran: It most certainly had to be, because if nobody questioned it, they made their decree confirming that title, and it had to be *prima facie*. That does not mean they have to bring a great deal of evidence to overthrow it, but it really puts the burden of going forward on the other party. That is all that it does.

In this very proceeding, when we started out to find out these water titles which were so chaotic, the first thing we had to do, as is required by the water law, was to send out notices at least thirty days before our investigation begins, that on a certain date the state engineer is going to start his investigation for his data, maps and measurements and that on a certain day thereafter the Superintendent of the Water Division shall proceed to take testimony.

Counsel for the appellant contends that the Water Board did not take testimony; that they merely took *ex parte* statements. The law provides in section 14 that when these notices are sent out, the Division Superintendent shall in addition enclose with such notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his rights; and upon that

blank form, which consists merely in answering the questions thereon propounded, he sets forth his right. That is all he has to do. He is not compelled to go into anything intricate, but he is compelled to describe his land accurately, because the irrigated area of the land is the basis upon which the water right is granted.

The statute provides in section 15 that these statements must be under oath; in other words, they are affidavits, and under our code it is provided that evidence can be produced by affidavit, by deposition, or orally in court. Affidavit is one form of evidence, and that is used here, so that the evidence there taken is the basis upon which it starts.

What is the next step? After all of these affidavits are collected showing their various water rights as they claim them, notices are sent out to each of those who have filed those affidavits. Those notices are sent by registered mail not less than ten days before the time set. All parties are notified that at a certain time all of those affidavits will be at a certain place for their inspection, and the truth of those affidavits is therein tested by that public inspection. But they do not have to appear and look at them. They can pass the proceeding on by if they so desire. They can wait until the Water Board has filed its findings before the Circuit Court of the State of Oregon, and appear there and make their exceptions.

In the case of *in re North Powder*, decided by the Supreme Court of the State of Oregon and reported in 75 Oregon 783, that court said that the parties, irrespective of a contest filed before the court, could file their exceptions before the circuit court, and the circuit court could try them out. Those exceptions being filed to the findings, if there is not sufficient evidence sent up from the Water Board, the circuit court can take evidence of its own accord, or refer it to a referee, or send it back to the Water Board for more evidence. So that at every step notice is given to the parties and at every step there is opportunity for them to be

heard. The court, in reviewing that, is given the greatest latitude. If the board does do wrong, if the board does formulate its findings wholly upon hearsay testimony, then of course that review in the court would set it aside, and make it right. There is, therefore, an opportunity there to be heard.

Counsel says further that when the board makes its findings, its findings are in full force and effect, and the board immediately proceeds to enforce those findings. But there is one other section of the water law which is very controlling in that matter. It is section 28 of the water law, and it reads like this:

“During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control—”

—which, by statute, is now called the State Water Board—

“—the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.”

So that we have a statutory declaration that the distribution of water is not made until it is pending in the circuit court.

Counsel says that the distribution takes away your property and you have no redress, you cannot get an injunction against it; but the statute in the very next section provides as follows, in section 29:

“At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced.”

There is a stay bond. If he goes into court to get an injunction, he would have to put up some kind of a bond; he would have to put up a bond for security in an amount determined by the judge of that court, and conditioned upon the very same things; so that before the judgment or decree of the circuit court is entered, we have there ample provision for him to protect himself.

How is it after that? Counsel cites sections of the water code showing that the watermaster cannot be enjoined. That is true after the decree of the circuit court has been entered. Why is that?

Should a court issue an injunction enjoining the officers of the law from enforcing its former decree? The statute says that the watermaster shall not be enjoined if he is following the order of the board, and when the order of the board has been finally confirmed by the court, then the party aggrieved cannot get the proceeding stayed because the stay bond proposition would not apply. He does not need an injunction before the decree of the court, because the stay bond is sufficient. After the decree of the court he cannot get an injunction if the watermaster is following the decree of the court—and that is right. If he is not following the decree of the court, then of course he can get his injunction. If, after a decree of the court has been entered, the enforcing of that decree works a grievance, then he should apply for his remedy to have the decree set aside for fraud, or for whatever proposition that he could, under the laws which allow them to set that decree aside.

Mr. Justice McReynolds: Has the Supreme Court considered this statute in any particulars?

Mr. Cochran: Yes, sir. In the cases of *Cookingham vs. Lewis*, and *in re North Powder*, and *in re Willow Creek*, and also in the case of *in re Cottonwood Creek*.

Mr. Justice McReynolds: Were those points involved here passed on?

Mr. Cochran: The same points are passed on in the case

of *in re* Willow Creek as are involved here, and the State Supreme Court has held this statute, in the case of *in re* Willow Creek, constitutional in all respects.

There is one other case where another point was involved which is commented on here. In the case of fees for filing the statements of claim, that matter is considered. In the case of Pacific Live Stock Co. *vs.* Cochrane, a suit was brought by the Pacific Live Stock Co., the appellant here, to recover back the fees which it had paid for the filing of its statement of claims. The Supreme Court held that those fees were properly levied, that the statute was a proper statute and constitutional; so that that question, I believe, we should consider is settled here so far as fees are concerned.

The appellant having appeared and having paid the fees, and the statute making it incumbent upon the board, when a claimant has appeared, to protect his rights, naturally he could not avail himself of that question.

Mr. Justice McReynolds: How far had these proceedings gone when this injunction was granted?

Mr. Cochran: There has not been any injunction issued in the matter, and the proceedings have had the claims filed, the contests have been filed, and most of the testimony has been taken in the contests.

Mr. Justice McReynolds: How far had you proceeded when this suit was brought?

Mr. Cochran: I think the contests had just been filed. The claims had been open to public inspection, and the contest had just been filed when this suit was brought.

Another point of which counsel has complained is the matter of the report of the State Engineer as to the data and information which he gathered. That statute which provides for the State Engineer to gather that information provides that all of the data, maps and information which he gathers shall be filed in the office of the State Engineer as a public record, and that certified copies of those maps, information and data shall be filed with the State Water Board.

He complains that that is non-oathbound, that it is done without the sanctity of an oath, and without the opportunity of cross examination. The same thing can be said of all public records. The report of the State Engineer is filed in his office, is a public record, and made so by statute; and being a public record, under the laws of evidence, a certified copy of those public records can be introduced in evidence in any legal proceeding, even. They simply have the sanctity of being an official public record.

The next proposition to which counsel refers is where he is injured——

Mr. Justice McKenna (interposing): Does your proposition go so far as to say the law can make hearsay testimony a public record and have it introduced in evidence?

Mr. Cochran: No, not at all; hardly so broad as that; but it can so make the record of official acts, the record of official data gathered.

Mr. Justice Holmes: Do you not understand that the law could not make hearsay testimony a public record?

Mr. Justice McKenna: I used the word "hearsay" inadvertently; I meant "*ex parte*."

Mr. Cochran: If hearsay evidence is the best evidence that can be secured, it is sometimes used; but *ex parte* evidence may be in the nature of records; for instance, the stream measurements gathered by the United States departments, the geodetic survey, are used a great deal in water states, simply certified copies of those measurements, and those propositions are along the line covered by the State Engineer. His measurements of the land and his maps which he makes of that irrigated area, the measurements of water flowing in the stream and in the ditches, give an idea of what the water user is really using.

The next proposition which counsel puts before us is that it is going to cost him \$50,000 to prosecute his side and put forward his claims and defend them. That is a mere arbitrary sum. It depends entirely upon his own volition as to

how much he spends, and there is no provision of the statute which compels him to do that. Blank forms, which are sent out by the Water Board containing questions for the water claimant to answer, can be filled in by any one merely answering the questions. They are sworn to before the division superintendent without any charge, and when they are filed he simply pays the filing fees which are required by statute there, and they are in no manner equal to that amount. With the Pacific Live Stock Company, where they had about thirty-five thousand acres of land, the filing fee was \$401.

If they want to take testimony before the Water Board, they may do so; but if they do not want to, they do not have to do so. They can wait entirely until they get into the circuit court, where it becomes a trial of judicial propositions regarding the findings of the board, and have all of their expenses there, which would be just the same as in any other legal forum.

Counsel says again that if he does not appear, his claims will be forfeited. There is opportunity for him at every turn to appear and be heard. If he does not get notice of the proceedings by the regular means provided by the statute, then when the findings go into effect the law gives him one year thereafter to intervene. Why is that one year given? It is on this supposition, that during that year from the time of the decree of the circuit court, these findings will be enforced, and naturally in the enforcement of those findings, if a person had not appeared, or tried to use the water, the water master would attempt to shut off his water because he had not been allowed water under that decree. So, therefore, he would, if he used the water at all, necessarily have to have notice of those proceedings during that ensuing year, and the statute provides that he shall be allowed to come in and intervene and have his rights determined therein.

When we consider the whole matter from beginning to end, the whole statute gives ample opportunity at every turn

for them to protect themselves. If they cannot come in and protect themselves by injunction, the statute has provided for a stay bond to stay the proceedings. After the decree is made, then of course the court itself has jurisdiction.

The Chief Justice: Suppose we have had all these proceedings, the board has made its report, and it has gone into court, and nobody has gone in there in opposition, and the year is passing by, then when the man comes in what are his rights? Has he the same rights that he would have had if he had gone into court before?

Mr. Cochran: During the period of the year after the court's decree?

The Chief Justice: Yes. You said they gave a year.

Mr. Cochran: He has a right to intervene. He files a petition of intervention, and his rights then will be determined in correlation to all the other rights that have been theretofore determined in the order of the court.

Mr. Justice McKenna: With the right to introduce testimony?

Mr. Cochran: Yes, with the right to introduce testimony and try it out on all the particulars that he desires, and the court at that time would have the right, if it so desired, to call in the Water Board to take that testimony, or refer it to a referee to do any of the things which the court would ordinarily do by taking it before the court itself.

Mr. Justice McKenna: In that proceeding, the data taken before the board would be *prima facie* evidence?

Mr. Cochran: It would be *prima facie* evidence. But that is only a matter of going ahead. It puts the burden of going forward upon the party who intervenes. It is the same as the reports of the Interstate Commerce Commission in the finding or fixing of rates, and the same as to state railroad commissions. They are *prima facie* correct.

I thank your honors.

Closing Argument, by Will R. King, Esq., on Behalf of the Appellees.

Mr. King: If Your Honors please, I feel that after listening to the arguments of my associates in this case, there is not very much left to be said.

It appears to me, after a reading of the briefs—I did not have the honor of assisting in preparing the briefs, but I find them very interesting and very exhaustive—that about all there is to this case is a question of constitutional law; that is, whether the proceeding here provided for is in violation of the 14th amendment to the constitution of the United States.

In the Willow Creek case from the Supreme Court of the state of Oregon, 144 Pacific, which is cited on the brief, it has been held that the procedure which has been here adopted is in accordance with the provisions of the constitution of the state of Oregon. I take it that it is very much like our former practice of taking testimony before referees, and reporting the same to the circuit court and if exceptions were not taken thereunder, the circuit court would adopt the report, which was a common practice in that state for many years. I never heard of anyone questioning the decree of the circuit court of Oregon, which approved a report of a referee who had been appointed in a suit in equity to make a report upon the findings of fact and conclusions of law, in a case where no exceptions were taken to those reports. This appears to be another form of proceeding in which a method is provided whereby suit may be instituted for the quieting of the title to property, quieting the title to water rights, and authorizing the State Water Board to institute proceedings after the proper showing has been made for that purpose.

Ex parte testimony, which is referred to by counsel, all has reference, as I take it and as I recall it, to the affidavits which were filed before the Water Board. Those affidavits were in the nature of complaints filed before the Water Board.

Mr. Justice McKenna: Is there an example of them in the record?

Mr. King: I think there is a sample of them here. Yes, I am quite sure there is a sample of the affidavits. Anyway, it is another form of complaint.

After the Water Board considers these matters, and if it thinks the facts are sufficient to justify it, a publication is made in two newspapers in the vicinity of the property involved and registered letters are sent to every water right claimant that can be found, and they are brought into court in that manner. Then they can come in and file their affidavits, setting up their rights, and those who are dissatisfied with those affidavits or the showing made by those affidavits have about sixty days, I think it is, in which to file counter-affidavits; and that presents the issue upon which the case is tried.

A statement was made, by which I think the counsel did not mean to mislead the court, but it was misleading to me when I first read his brief—that is, that this was *ex parte* testimony, which statement is not justified by the record. They come in then before the water board and present their testimony, and the case is tried out just as it is tried before a referee in an equity case. The evidence is filed, and they cross-examine the witnesses just as has been done hundreds of times in the state of Oregon for fifty years past before referees who take testimony in equity suits, and they submit their findings of fact and conclusions of law to the court. That is all there is to that.

The supreme court of Oregon has repeatedly upheld that procedure. One strong case is the Willow Creek case in 144 Pacific. That procedure, as I say, has been upheld by the supreme court of the state of Oregon. The case from Wyoming covers the field completely, and this law is patterned after the law there considered by the supreme court of Wyoming. Counsel has mentioned that I had something to do with this law, but on that I propose to stand mute until we get through with this case. I do not think it has very

much to do with it as to who drew it. If it turns out to be all right, I will probably plead guilty.

Farmers Investment Company, 50 L. R. A. 747, interprets the statute of Wyoming. The procedure in that case is almost identical with this. As in this case, after this testimony is taken, after the findings of fact are filed, they have a certain time in which to appear before the circuit court and make their exceptions and their objections, and the circuit court has, within its power, the right to order a rehearing, to send it back for further testimony, or to open up the case and take the testimony then and there. But if no one appears, then the circuit judge signs the findings of fact or the decree as turned over to him by the board, or as the circuit judge may see fit to remodel it, and it is then entered.

Coming back to the question which I was about to make a moment ago, it appears to be well settled that when it comes to the question of what is a court in a state, as to what is due process of law, when being tried out before a court, that is a matter for that state tribunal and the supreme court of that state to determine. That was fully settled in 219 U. S. 147, from California, where the question of land titles growing out of the unfortunate circumstance of the earthquake was involved, where a man had settled upon a piece of land or was occupying a piece of land and would bring suit to quiet the title. We have a like law in Oregon and in a number of states, known as the Torrens land act, where notice is published to all the world that if any one claims the title to this particular tract of land, they must come in and assert that title. That appears to be the statute of California upon that subject. That was upheld by this honorable court in 219 U. S. 147.

Taking together the two questions that the decision of the state supreme court determines what the judicial tribunal may be, the manner of procedure of that court, and that this court recognizes that as being final, I see nothing left for consideration in this case.

I thank you.

Reply Argument on Behalf of Appellant.

Mr. Treadwell: If the Court please, there were three things stated that I think I should call to the attention of the Court.

The first suggestion of Mr. Cochran, that the decision in the California Land case is authority for them in this case and against myself, is rather peculiar in view of the fact that his Honor, Judge Field, called particular attention to the fact that the case was strictly judicial; that the tribunal that was created was strictly a judicial tribunal; that the decree was just like the decree of any other court, and the proceedings were the same; and called attention to the fact that if that were not so, the whole proceeding would have been so onerous as to be entirely wrong. He says:

“The onerous duty thus thrown upon him was relieved of its oppressive character by the accompanying assurance that, when his claim was adjudged valid, the adjudication should be final and conclusive.”

This Court, in another case, regarding the same statute, said that the Commission was a tribunal possessing all of the elements and all judicial functions that guarantee a judicial proceeding, so that his title could be established if it was found to be valid or rejected if it was found to be invalid.

The second proposition that was made here was that we were given an opportunity, so to speak, to bail ourselves out. The statute on that subject says we may do that provided we give a bond, unlimited in amount so far as this statute is concerned, to answer to all people for any damage that may accrue to them by reason of the adjudication or determination not being enforced. What would be the result? The result would be that if we put up that bond, we would be responsible to all the two hundred and four people on

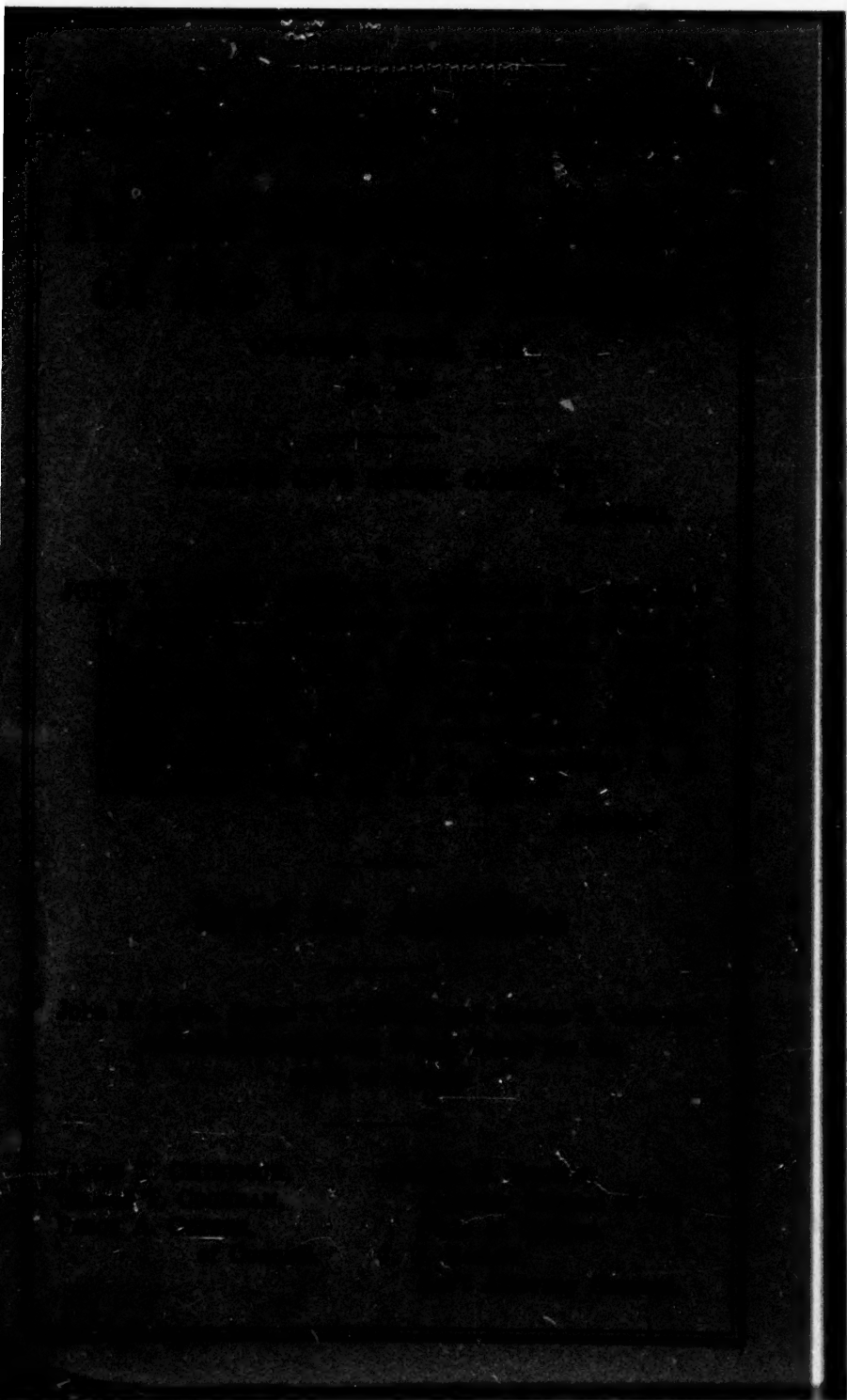
this river, no matter who took the water away. It would make no difference whether we took it or who took it, because we would have to stay, under the terms of this statute, the entire proceedings, and then any man could say, "Well, we would have gotten our water if this determination had been carried out, but since it was not carried out, we did not get our water, and somebody else took it—Tom, Dick or Harry," and we would have to answer for that result.

The only other thing that I care to say in this matter, your Honors, is an unqualified acquittal of my friend Judge King, so far as the charge is made that he is responsible for this law. I want to say that I know personally that Judge King was personally opposed to these very provisions which I say make this law an invalid enactment.

Mr. King: I plead not guilty, your Honors.

The Chief Justice: That is personal, gentlemen.

(Thereupon, at 4:15 o'clock p. m. the arguments were closed and the case submitted.)





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V. We contend that, regardless of appellant's right to now raise the question, the order remanding was a proper one and that the proceeding was not removable because (1) the proceeding was at the time (and still is) administrative and pending before an administrative board; (2) there was no separable controversy; and (3) the State is a necessary as well as proper party to the proceeding 134

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In the Supreme Court of the United States

OCTOBER TERM, 1915

No. 300

PACIFIC LIVE STOCK COMPANY,

Appellant,

v.

JOHN H. LEWIS, JAMES T. CHINNOCK and GEORGE T. COCHRAN, constituting the State Water Board for the State of Oregon; C. B. McCONNELL, EMORY COLE, and LEONARD COLE; HARNEY VALLEY IMPROVEMENT CO. (a corporation), SILVIES RIVER IRRIGATION CO. (a corporation), and WILLIAM HANLEY COMPANY (a corporation); R. R. SITZ, FRED OTLEY and M. B. HAYES,

Appellees.

Brief for Appellees

John H. Lewis, James T. Chinnock and George T. Cochran,
constituting the State Water Board for the
State of Oregon

Preliminary Statement

This is an appeal direct from the judgment of the United States District Court for the District of Oregon, dismissing the bill of complaint for the reason that it failed to state a cause of suit (217 Fed. 95). It is stated by appellant that the only question for review is "whether appellant bases its rights upon the Constitution of the United States." (p. 2, Appellant's Brief.) The purpose of the suit is to have declared invalid an act of the Legislature of the State of Oregon because "in contravention of the Constitution of the United States."

Statement of the Case

In February, 1909, the Legislature of Oregon passed the act referred to in the bill of complaint, and it became effective February 24, 1909. Appellant has set forth in its brief a part of the act in question, as originally enacted and without reference to subsequent amendments. These amendments, in so far as we deem them important here, and other sections not set forth in appellant's brief, we refer to in detail at other parts of this brief.

In the State of Oregon the doctrine of appropriation, as in most other western states, is the paramount doctrine governing rights to the use of its natural streams, although the common law rule of riparian rights, in a modified and limited form, is also recognized and applied in certain cases. The act here attacked is in most respects similar to statutes which have been in force in Colorado and Wyoming for many years, and particularly is an adaptation of the Wyoming statutes upon the same subject, to the conditions existing here, and the laws and constitution of Oregon. It is a matter of judicial knowledge that the greater part of the State of Oregon, including all that part east of the Cascade Mountains, is a part of the so-called arid region, where irrigation is necessary in the production of crops and the utilization of the soil. The conditions existing generally throughout the arid region exist here, so that, although every drop of water in the natural streams of that region of the State should be utilized, there will still remain a vast area of land without water for its irrigation and consequently unproductive.

There is a natural stream known as Silvies River, which rises in the mountains many miles northerly of a valley known as Harney Valley, in the State of Oregon, and flows southerly, and after entering the valley, divides into two forks, and, after flowing for about twenty miles farther, empties into a lake called Malheur Lake. The country round about is desert in character, but by means of irrigation with the waters of this river, many thousands of acres of valuable land have been reclaimed and made productive, and it is probable (or at least possible) that the area of land irrigable from this source may be considerably

extended without injury to or interference with existing rights. The appellant is the owner of a large body of land riparian in character to Silvies River and its forks and branches. More than two hundred claimants, in addition to appellant, are utilizing, or claiming the right to utilize, the waters of this stream and its tributaries and forks for irrigation purposes, and have appeared in the proceedings before the Board hereinafter referred to.

Considerable litigation between the various claimants to the waters of this stream has been occasioned in the past by the use of the water for irrigation and other purposes, and has continued from early times down to the present.

The case of *Pacific Live Stock Co. v. Hanley*, reported in 200 Federal 468, was a supplemental bill in equity by the appellant for the construction of a prior decree (See 98 Fed. 327) between the parties, and to aid in the enforcement of that decree. The case of *Pacific Live Stock Co. v. Silvies River Irr. Co., et al.* (200 Fed. 487), was a suit in equity by appellant involving the use of surplus waters of Silvies River for the irrigation of nonriparian lands.

In November, 1911, after the passage of the statutes here attacked, certain claimants to the use of the waters of Silvies River filed a petition with the Board of Control of the State of Oregon (now designated by statute as the "State Water Board"), alleging that they were users of the waters of said stream, that the waters of said stream and its tributaries were claimed by various claimants, and requesting that a determination of the relative rights of the various claimants to said stream and its tributaries be made.

In January, 1912, the State Water Board ordered that a determination be made, fixing the time for the commencement of an investigation by the State Engineer and the time and place for the commencement of the taking of testimony by the Division Superintendent. Notice was duly given by publication and registered mail as required by the statute, and among many others, appellant was notified of the time and place for the presentation of statements of claim and evidence.

Before filing its proof of claim or offering any testimony or evidence in its behalf, and prior to any contests or

the period for public inspection of evidence provided for by the statutes, appellant attempted to stay further proceedings and withdraw the entire preliminary proceedings from the jurisdiction of the State Water Board, and the proceedings thereafter to be had in the State courts, by filing on July 26, 1912, with the State Board a petition for the removal of said proceedings to the Federal District Court, alleging in the petition that it was a citizen and resident of the State of California, and that the petitioners, Sitz, *et al.*, were all residents of the State of Oregon, and that there was a controversy existing which was wholly between appellant on the one side, and said petitioners on the other, and which could be fully determined between them, and further alleging the facts purporting to show such controversy, and that the matter in controversy exceeded in value the jurisdictional amount. With said petition was filed a proper bond, and a transcript of the entire record was within due time filed in the Federal District Court. Thereafter, on motion of the petitioners, the Federal District Court remanded the proceeding to the State Board, and refused to retain jurisdiction, and since remanding the same, the proceedings, as appears from the bill of complaint, have been carried on before the State Board, and appellant has submitted itself to the jurisdiction of said Board, and has offered proof of its claims to the waters involved, and has paid the fees required by the statute to be paid as filing fees at the time of submitting its statement and proof of claim. In addition to appellant, more than two hundred claimants to the waters involved, including the petitioners for the proceeding, have offered proof of their claims to the said waters. Thereafter the evidence taken at these original or initial hearings was duly opened to public inspection, and the various claimants were permitted to file contests, and the appellant thereupon exercised its right to file contests, as permitted by statute, before the Board, and "filed contests to all of said claims so filed as aforesaid," including all of the two hundred and four other claimants, and not alone the petitioners for the proceeding. A number of the claimants also contested the claims made by the appellant, and additional contests were filed in which the appellant was not involved.

A matter referred to by appellant in its brief, but not made a part of its bill of complaint, is the action brought by the appellant against the Superintendent of Water Division No. 2 to recover the filing fees paid by appellant under protest (as it alleged) provided for by a section of the statute assailed (Section 17 of the act, on page 9 of appellant's Brief), upon the ground that the section of the statute in question was repugnant to the provisions of the State and Federal Constitutions, and the fees had been illegally collected and had been paid by appellant under protest. The Supreme Court of Oregon, on appeal, affirmed the decision of the lower court, and held that the section providing for payment of fees in nowise contravened either State or Federal Constitution, and that appellant had no cause of action. (73 Ore. 417.)

Before the various contests filed by appellant, as well as other claimants, hereinbefore referred to, had been set for hearing, although, as appears from the bill of complaint, the State Board was preparing to set a time and place for a hearing of these contests (as the statute provides), the appellant filed this bill of complaint in the Federal District Court for the District of Oregon, to restrain the several members of the State Water Board, in their official capacities, from further proceeding, and to enjoin the other defendants, claimants to the waters involved. It is alleged that the statutes of Oregon here involved deprive the appellant of its property without due process of law and deprive appellant of the equal protection of the law, all in violation of the Fourteenth Amendment of the Federal Constitution. It is alleged at another point that appellant's property "will be taken for a public use without just compensation." From a judgment of the Federal District Court, dismissing the bill of complaint, in that it failed to state a cause of suit, appellant has perfected an appeal to this court.

THE IRRIGATION PROBLEM IN OREGON

The following descriptive statement so well describes the topographic and hydrographic features of Eastern Oregon, that we here insert it. It was written by Mr. F. H. Newell, then Chief Engineer of the United States Recla-

mation Service, and is to be found on page 350, *et seq.*, of his book on "Irrigation." Mr. Newell says:

The western portion of Oregon, bordering on the Pacific Ocean, is humid. The belt of well-watered land extends easterly to the Cascade Range, which forms a barrier to the progress of the moist winds on their journey inland. About two-thirds of the State is on the eastern or dry side of the mountains, and in this portion irrigation is necessary for most crops, although wheat, barley and rye are successfully cultivated by dry farming on the uplands around the Blue Mountains and near the Columbia River.

The country east of the Cascade Mountains may be pictured as a series of broad plains and mesas, covered with lava of various ages, from that outpoured recently to the ancient flows whose surface has largely changed into soil. This supports a dense growth of sagebrush, and also juniper near the mountains, these being intermingled with forage plants. The vegetation becomes sparse out on the broad valleys, but nearly everywhere furnishes good grazing.

The erupted material forming the plains is similar in many respects to the vast sheets of lava or basalt covering the valleys of Southern Idaho. These lavas occur around the Blue Mountains, and are apparently continuous from Southern Idaho to the Great Bend country of the Columbia in Central Washington. Volcanic cones rise from these plains, and the general level is interrupted in places by mountain masses whose lower portions have apparently been buried by the outpouring of fluid rocks. The altitude of this land is from 3,000 to 4,000 feet, the mountains rising to 8,000 feet or over. The most important of these are the Blue Mountains, in the northeastern part of the State, which consist largely of extremely steep, rugged peaks, snow-capped for a considerable part of the year. The foothills of these mountains, at altitudes of from 5,000 to 7,000 feet and over, are covered with timber, much of it being pine of considerable value. From these highlands come the streams important in irrigation development.

Water storage is highly essential for the growth of agriculture in Central Oregon. The streams are small and intermittent in character. Reservoir sites are known to exist on them, but none have been sur-

veyed. Crooked River, which receives its supply from the Blue Mountains, is typical. It has spring floods, which rapidly subside toward summer, until the channel of the stream is nearly dry. By building dams at a number of localities along its course it is probable that the summer flow can be increased to an extent sufficient to irrigate many thousand acres.

Similar to this is Silvies River, which flows out upon the northern edge of the Harney plain or desert. Where this stream leaves the canyon it has built a broad delta, through which the water meanders in a number of channels. Much of the ground is overflowed during the spring flood, and considerable areas, originally marshy, have been utilized as hay lands by slightly regulating the flow of the stream and by annually cutting the native grasses and weeds. The quality and quantity of these are greatly improved by this regular treatment. The area of valuable hay land has been increased by check dams placed in diverging channels, causing the floods to spread on the low lands. The cultivation of more valuable crops can be made feasible by enlarging the canals from Silvies River, and especially by insuring ample water for summer through the construction of storage works. The same thing is true to a greater or less degree of the various tributaries of Malheur River and other streams issuing from the Blue Mountains.

Where a sufficient supply cannot be had from surface streams, it may be practicable to obtain water from underground, particularly from artesian wells sunk in the broad desert valleys. The structure of some of these is known to be favorable to the accumulation of water, and it is highly important to make a thorough geologic examination, if necessary by the drilling of one or two wells of such depth as to penetrate the recent deposits and definitely determine whether flowing water can be had. By so doing maps can be prepared showing the depth to the water-bearing horizon and the probable height to which the water will rise. This is true of the broad valleys of Central Washington, as well as of the Harney and Malheur Valleys of Oregon. The soil of these is very fertile, and in many places the forage plants furnish good grazing; but the distance from springs or streams is so great that cattle cannot graze except during the winter season, when pools of water are occasionally formed. If a supply could be had from deep wells the cattle and sheep

industry would be greatly benefited and it is possible that considerable areas might be irrigated. With improved transportation facilities there will be opportunities for making many farms on the vacant land of Central Oregon.

We may add to this the further statement that the need for irrigation is not confined to the eastern part of the State. In Western Oregon irrigation has long been practiced and it is recognized that irrigation is an essential factor in the future development of the Willamette Valley and Southwestern Oregon. These regions are only semi-humid in character, and long periods of drouth occur practically every summer season. The rainfall in the Willamette Valley, while excessive, unfortunately is confined to the winter and spring seasons, and little precipitation ordinarily occurs during the crop-growing season. In Southern Oregon, west of the Cascades and east of the Coast Range, irrigation is extensively practiced and is an important factor in the agricultural industry.

The doctrine of appropriation was held applicable to the Willamette Valley, in the case of *Parkersville Drainage Dist. v. Wattier*, 48 Ore. 332, although power and not irrigation was there involved. In the cases of *Hedges v. Riddle*, 63 Ore. 257; *75 Ore. 197*, the doctrine of appropriation was applied to the use of water for irrigation by a riparian owner in Douglas County. The cases of *Davis v. Chamberlain*, 51 Ore. 304; *Britt v. Reed*, 42 Ore. 76; *Mattis v. Hosmer*, 37 Ore. 523; *Watts v. Spencer*, 51 Ore. 262, and *Carson v. Gentner*, 33 Ore. 512, involved rights of appropriation for irrigation purposes in Jackson and Josephine Counties, in Southern Oregon, west of the Cascade Mountains.

At the back of this brief we have inserted two maps from the report of the State Engineer of Oregon for 1913-1914. One of these maps (Figure I) shows the progress of water right determinations under this statute at that time. The other (Figure 18) shows the ditches and irrigated lands involved in the Silvies River determination.

THE OREGON WATER CODE

The Oregon Water Code, so-called, was enacted and became effective February 24, 1909, and is Chapter 216 (p. 319), General Laws of Oregon for 1909.

In appellant's brief (page 6, *et seq.*) a portion of this act relating to water right determinations has been set forth. Several sections there quoted have been amended, and one (Sec. 21, p. 11, appellant's brief) has been repealed. These amendements were made prior to the institution of this suit.

Omitting the sections set forth by appellant, which have not been amended or repealed, we will here quote *in toto* or refer to the several other sections of the act, omitted from appellant's brief, or amendements of sections therein quoted.

The title of the act is as follows:

An act providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

Section 1 (Sec. 6594, Lord's Oregon Laws) (so far as material) provides:

Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water; * * *

Section 2 (Sec. 6609, Lord's Oregon Laws):

§ 6609. Water Divisions.

The State of Oregon is hereby divided into two water divisions, as follows: Water Division No. 1 shall consist of all lands embraced within the following counties, to-wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington. Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State. [Laws 1909, Chap. 216, p. 319, Sec. 2.]

Section 3 (Sec. 6610, Lord's Oregon Laws) :

§ 6610. Division Superintendents; Appointments and Term Of.

There shall be one Superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the Governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a Division Superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said Water Superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and the hydrographic features of the water division in which the candidate may reside. [Laws 1909, Chap. 216, p. 319, Sec. 3.]

Section 4 (Sec. 6611, Lord's Oregon Laws) :

§ 6611. Duties.

Said Division Superintendent shall have general control over the Water Masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State. [Laws 1909, Chap. 216, p. 319, Sec. 4.]

Section 5 provides for appeals from the decision of the Division Superintendent.

Sections 6 and 7 provide for the compensation of Water Superintendents, and their official oath and bond.

Section 8 (Sec. 6597, Lord's Oregon Laws) provides :

§ 6597. State Engineer.

As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor. He shall hold his office

until January 1, 1911, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of \$2,400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes. [Laws 1909, Chap. 216, p. 320, Sec. 8.]

Section 9 (Sec. 6603, Lord's Oregon Laws) provides:

§ 6603. Board of Control.

The State Engineer and the Superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decision of the said Board shall be subject to appeal to the Circuit and Supreme Courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said Board shall have an office in the Capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the Second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be *ex officio* president of said Board, and shall have the right to vote on all questions coming before it. A majority of said Board shall constitute a quorum to transact business. The Board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the Board are present. [Laws 1909, Chap. 216, p. 321, Sec. 9.]

By Chapter 82, General Laws of Oregon for 1913, p. 136, it is provided:

Section 1. That the Board of Control, provided for and created by the provisions of Section 9, Chapter 261, General Laws of Oregon for 1909, the same being Section 6603, Lord's Oregon Laws, shall hereafter be known officially and entitled and designated as the "State Water Board," and shall, as heretofore, consist of the State Engineer and the Superintendents of the water divisions within the State. Said Board shall have the same powers and perform the same duties as prescribed by law for said Board of Control, and wherever the words "Board," "the Board," or "Board of Control," are used or appear in any of the provisions of said Chapter 261, General Laws of Oregon for 1909, or any act or acts amendatory thereof, or act or acts referring to said Board of Control, as created by said section, the same shall be deemed and construed to mean the "State Water Board," which is hereby made the official title of said Board.

Section 2. Nothing in this act contained shall be deemed, construed or taken to be an amendment or modification of any of the provisions of Chapter 216, General Laws of Oregon for 1909, or acts amendatory thereof, except as to the official title of the said Board created by the provisions of said Chapter 216. [Laws 1913, Chap. 82, p. 136.]

Section 10 provides for the employment of a secretary and other assistants.

Sections 11, 12, 13, 14, 15, 16, 17, 18 and 19 are set forth in full in appellant's brief, at pp. 6 to 10 inclusive, and provide for the procedure for the determination of rights.

Section 20 (on p. 10 of appellant's brief) (Sec. 6644, Lord's Oregon Laws), was amended by act of the Legislature of date February 21, 1913, (General Laws of Oregon for 1913, Chap. 86, p. 138), and now reads as follows:

§ 6644. Hearing.

Said Superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as sum-

mons are served in civil actions in the circuit courts of this State. Superintendents of water divisions shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and shall have the power to order the taking of depositions and to issue commissions therefor in such manner as the Board of Control by rule may provide, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest. [Laws 1909, Chap. 216, p. 324, Sec. 20; Laws 1913, Chap. 86, p. 139, Sec. 3.]

Section 21 (Sec. 6645, Lord's Oregon Laws), set forth on p. 11 of appellant's brief, relating to deposits in cases of contests, was repealed by act of the Legislature of date February 21, 1913, (Sec. 7, Chap. 86, p. 138, General Laws of Oregon for 1913).

Sections 22 and 23 are set forth on pp. 11 and 12 of appellant's brief.

Section 24 (p. 12, appellant's brief) (Sec. 6648, Lord's Oregon Laws), was amended by act of February 21, 1913, (General Laws of Oregon for 1913, Chap. 97, p. 161), and as amended reads as follows:

§ 6648. Order Determining Water Rights.

As soon as practicable after the compilation of said data (data) and the filing of said evidence in the office of the Board of Control, the Board shall make and cause to be entered of record in its office, findings of fact and an order of determination, determining and establishing the several rights to the waters of said stream. The original evidence filed with the Board, and certified copies of the observations and measurements and maps of record in the State Engineer's office, in connection with such determination as provided for by Section 6647, Lord's Oregon Laws, together with a copy of the order of determination and findings of the Board

of Control, as the same appears of record in its office, shall be certified to by the secretary of the Board, and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of such order of determination and findings shall be filed in every other county in which such stream, or any portion of a tributary, is situated, with the county clerk. Upon the filing of such evidence and order with the court, the Board shall procure an order from said court, or any judge thereof, fixing the time at which the determination shall be heard in said court, which hearing shall be at least forty days subsequent to the date of such order. The clerk of said court shall, upon the making of such order, forthwith forward a certified copy thereof to the secretary of said Board by registered mail, and said secretary shall immediately upon receipt thereof by registered mail, notify each claimant or owner who has appeared in the proceeding, of the time and place for such hearing. Service of such notice shall be deemed complete upon depositing such notice in the postoffice as registered mail, addressed to such claimant or owner at his postoffice address, as set forth in his proof, theretofore filed in the proceeding. Proof of such service shall be made and filed with the circuit court by such secretary as soon as possible after the mailing of such notices. The determination of the Board shall be in full force and effect from the date of its entry in the records of the Board, unless and until its operation shall be stayed by a stay bond as provided by this act. [Laws 1909, Chap. 216, p. 326, Sec. 24; Laws 1913, Chap. 97, p. 161.]

Section 25 is set forth on pp. 12 and 13 of appellant's brief.

Section 26 (p. 13, appellant's brief) (Sec. 6650, Lord's Oregon Laws), was amended by said Chap. 97, General Laws of Oregon for 1913, p. 161, and now reads as follows:

§ 6650. Court Procedure.

From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for by Sec. 6648, Lord's Oregon Laws, as in this act amended,

any party, or parties jointly interested, may file exceptions in writing to such findings and order of determination, or any part or parts thereof, which exceptions shall state with a reasonable degree of certainty the grounds of the exceptions and shall specify the particular paragraphs or parts of such findings and order excepted to. A copy of such exceptions, verified by such exceptor, or certified to by his attorney, shall be served upon each claimant, who was an adverse party to any contest or contests wherein such exceptor was a party in the proceedings, prior to such hearing. Such service shall be made by the exceptor or his attorney upon each of such adverse parties in person, or upon the attorney of such party, if he has appeared by attorney, or upon his agent; and if such adverse party is a non-resident of the county or State, such service may be made by mailing such copy to such adverse party by registered mail, addressed to his place of residence, as set forth in his proof filed in the proceeding. If no exceptions are filed the court shall on the day set for the hearing enter a decree affirming the determination of the Board. If exceptions are filed, upon the day set for the hearing, the court shall fix a time not less than thirty days thereafter, unless for good cause shown such time be extended by the court, at which time a hearing will be had upon such exceptions. All parties may be heard upon the consideration of the exceptions, and the Board of Control may appear on behalf of the State of Oregon, either by a member of such Board or by the Attorney General. The court may, if necessary, remand the case for such further testimony as it may direct, to be taken by the Division Superintendent, or by a referee appointed by the court for that purpose, as in a suit in equity in such circuit court, and upon the completion of such testimony and its report to the Board, said Board may be required to make a further determination. After final hearing the court shall enter a decree affirming or modifying the order of the Board of Control, and may assess such costs as it may deem just. Appeals may be taken to the Supreme Court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree. [Laws 1909, Chap. 216, p. 326, Sec. 26; Laws 1913, Chap. 97, p. 161.]

Sections 27, 28, 29, 30, 31, 32, 33, 34 and 35 are set forth on pp. 14 to 16 inclusive, of appellant's brief.

Section 36 (Sec. 6615, Lord's Oregon Laws) is as follows:

§ 6615. Districts.

The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water districts shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined. [Laws 1909, Chap. 216, p. 329, Sec. 36.]

Section 37 (Sec. 6616, Lord's Oregon Laws) is as follows:

§ 6616. Water Master, How Appointed.

There shall be appointed by the Board of Control, one Water Master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the Superintendent of the water division in which such water district is situated. Each Water Master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies, which shall occur in the office of Water Master. [Laws 1909, Chap. 216, p. 329, Sec. 37.]

Section 38 (Sec. 6617, Lord's Oregon Laws) is as follows:

§ 6617. Duty of Water Master.

It shall be the duty of the said Water Masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing

from said streams of his district. The Water Master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the Water Master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the facts that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the Division Superintendent or any Water Master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney. [Laws 1909, Chap. 216, p. 330, Sec. 38.]

Section 39 (Sec. 6618, Lord's Oregon Laws) is as follows:

§ 6618. Water Master Shall Prevent Waste.

Said Water Master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any Water Master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the Water Master has failed to carry into effect the order of the Board of Control or decrees of the court determining the existing rights to the use of water. [Laws 1909, Chap. 216, p. 333, Sec. 39.]

Section 40 relates to the compensation of Water Masters, and Section 41 to the employment of Assistant Water Masters.

Section 42 provides when the Water Master shall commence work.

Section 43 (Sec. 6622, Lord's Oregon Laws) provides:

§ 6622. **Interference With Headgate—Penalty.**

Any person who shall wilfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall wilfully use water or conduct water into or through his ditch which has been lawfully denied him by the Water Master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the Water Master or other competent authority shall be *prima facie* evidence of the guilt of the person using it. [Laws 1909, Chap. 216, p. 332, Sec. 43.]

Section 44 (Sec. 6623, Lord's Oregon Laws) provides:

§ 6623. **Power of Arrest.**

The Water Master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the Water Master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested. [Laws 1909, Chap. 216, p. 332, Sec. 44.]

Section 55 relates to the maintenance of headgates and suitable measuring devices at the heads or intakes of canals and ditches, and for the operation of reservoirs.

Sections 56 and 57, provide for inspection of dams, ditches and canals by the State Engineer, to insure the safety of the inhabitants of the vicinity.

Section 59 relates to the duty of the Water Master in the distribution of stored waters conducted down natural streams, and the regulation of headgates for the protection of such stored waters, when turned into such streams.

Sections 61 and 62 provide for joint liability of several owners of a ditch or canal for the expense of maintenance and operation thereof or the construction of headgates, or measuring devices.

Section 63 provides for the regulation of ditches and reservoirs owned by several water users, or from which several are using water, and for the distribution of water among the several users therefrom, and the payment of the expenses thereof.

Section 64 (Sec. 6667, Lord's Oregon Laws) provides:

§ 6667. Injunctions.

In suits for injunction affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed. [Laws 1909, Chap. 216, p. 339, Sec. 64.]

Section 65 provides that all water used for irrigation purposes shall remain appurtenant to the land upon which it is used.

Section 66 (Sec. 6669, Lord's Oregon Laws) provides:

§ 6669. Unlawful Use of Water and Waste.

The unauthorized use of water to which another person is entitled, or the wilful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters. [Laws 1909, Chap. 216, p. 340, Sec. 66.]

Section 67 (Sec. 6670, Lord's Oregon Laws) provides:

§ 6670. Obstructing Works.

Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor. [Laws 1909, Chap. 216, p. 340, Sec. 67.]

Section 68 provides penalties for violations of the provisions of the act, and Section 69 provides for the appropriation of money to carry the act into effect.

Section 70 (Sec. 6595, Lord's Oregon Laws) provides as follows:

§ 6595. Vested Rights Preserved.

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; *provided*, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use water shall be deemed vested in such riparian proprietor; *provided*, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors, or assigns, shall, in good faith and in compliance with laws existing at the time of filing of this act in the office of the Secretary of State, commence

the construction of works for the application of the water so appropriated for beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works or canal or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association or corporation, any riparian rights where no such rights existed prior to the time this act takes effect. [Laws 1909, Chap. 216, p. 340, Sec. 70.]

Section 71 provides for the protection of municipal water supplies.

Other Statutes.

The following statutes are not a part of the "Water Code," but are in force in Oregon and are important in considering the general trend and character of legislation in this State relative to the use of water:

Section 1 (Sec. 6675, Lord's Oregon Laws) of Chap. 221, p. 370, General Laws of Oregon for 1909, provides:

§ 6575. Water Belongs to Public.

All water within the State from all sources of water supply belong to the public. [Laws 1909, Chap. 221, p. 370, Sec. 1.]

Chapter 279 (p. 531), General Laws of Oregon for 1913, provides:

Right Lost by Failure to Use.

Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities; *provided*, that this act shall not apply to, or affect, the use of water, or rights of use, acquired by cities and towns in this State, by appropriation, or by purchase, for all reasonable and usual municipal purposes; and this act shall not be so construed as to impair any of the rights of such cities or towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the Legislature, or which may hereafter be acquired; and the right of all cities and towns in this State to acquire rights to the use of the water of natural streams and lakes within the State, not otherwise appropriated, and subject to existing rights, for reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of

growth of population, or to secure sufficient water supply in cases of emergency, is hereby expressly confirmed. [Laws 1913, Chap. 279, p. 531.]

THE OREGON CONSTITUTION

The Oregon Constitution, as adopted upon the admission of the State, was completed in 1857. At this time and for many years thereafter irrigation was an unknown factor in the development of the State. Consequently no constitutional provisions were adopted to conserve, protect and regulate the use of water in the arid part of the State. In this respect the Constitution of Oregon differs from those of Wyoming, Idaho, Colorado and other Western States, where declarations of public ownership have been incorporated in such constitutions. No provisions of the Oregon Constitution relate or refer in any way to the use of water or to irrigation. At the time of its preparation, Eastern Oregon, comprising the strictly arid part of the State, was represented by but one delegate in the convention, and excepting a settlement at The Dalles, few white persons resided east of the Cascade Mountains. This arid region of the State comprises two-thirds the area and a considerable population at the present time, and the farmers generally depend upon irrigation for successful crop production. Agriculture is the leading industry.

ANALYSIS OF THE WATER CODE

The Legislature, by the enactment of these statutes, sought to accomplish three distinct purposes, which are: First, the determination and adjudication of existing rights as fast as there should be a demand and a necessity therefor, and the completion of a record of such existing rights, which would enable the other purposes to be more effectually accomplished. Second, after the adjudication of existing rights have been made, provision is made for the distribution of the water, through public officials, known as "Water Masters," who have charge of the various stream systems within their division, and are under the supervision of the Division Superintendent. Third, procedure relative to future appropriations of public water, the purpose of which

was to maintain and continue the record of water rights secured through adjudication proceedings as new rights are acquired subsequent to the passage of the act.

(A) Water Divisions and Districts

The State, for purposes of administrative control, is divided into two water divisions, the western part of the State (and Klamath and Lake Counties) constituting Division No 1, and Eastern Oregon (excepting Klamath and Lake Counties) constituting Division No. 2. (Sec. 2.)

As fast as determinations of rights are made, and necessity arises for distribution, water districts are created by the State Board, within each division, so that, ultimately, each division will be divided into districts for purposes of local control and regulation. (Sec. 36.)

(B) The State Water Board

The State Engineer and Superintendents of the Divisions constitute the State Water Board, which has supervision of the appropriation, division, and use of all water within the State, after rights thereto have been adjudicated, determined, and made a matter of record as in the act provided. Appeals may be taken from the decisions of the Board to the courts of the State. (Sec. 9.)

(C) The State Engineer

The State Engineer is president of the Water Board and chief administrative officer in the system provided for. His office has charge and control (subject to the general supervision of the Board) of applications for the right to appropriate water and the granting of permits therefor, and of the surveys and water measurements and observations necessary in proceedings under the act for the determination of water rights.

(D) The Division Superintendents

The Division Superintendent has direct charge and control over the distribution and use of water within his division, and is the chief officer within the division for pur-

poses of administrative control. He is also a member of the State Water Board, which has supervision over his acts and duties. As a member of that Board, he is by law given immediate charge of proceedings within his division for the determination of water rights, and all the testimony, at the first *ex parte* hearings, and in contests, is taken before him, and subsequently filed with the Board.

(E) *Proceedings for Determination of Water Rights*

Sections 11 to 35 relate particularly to the determination and final adjudication of existing rights.

(F) *Course of Procedure*

Initiation.—The proceeding in Oregon is initiated by an order of the State Board (Sec. 11) after an investigation to determine whether the conditions will justify a determination. Before the Board can take any action, however, one or more water users must file a petition requesting a determination.

Notice.—Notice is given by publication (Sec. 12) and the Superintendent of the division gives notice to each claimant or riparian owner by registered mail (Sec. 13). The notice in each case specifies the time and place when the State Engineer will commence surveys and water investigations, and the Superintendent will commence the holding of *ex parte* hearings for the purpose of enabling each claimant to submit proof respecting his respective rights. With this notice a blank form is enclosed which, when filled in and verified, constitutes the statement of claim.

Statements of Claim.—In these statements of claim (Sec. 14) the claimants are required to set forth certain information in writing, including "all the particulars necessary for the determination" of the right of the claimant to the waters involved. Certain particular statements are required to be set forth, touching the claimant's alleged right and its character and the initiation thereof. These statements of claim stand in the place of the pleadings required in equity suits, but are not adversary in character until contested in a later stage of the proceedings. Mr. Kinney (Water Rights, 2 ed. p. 2854, Sec. 1574) says of these statements:

And while the technical forms of equity pleadings are superceded by these statements, it is required that the rights claimed must be set out therein with even greater particularity than is required in the pleadings under the regular practice in suits brought for that purpose, and which we have discussed in a previous chapter.

The reason for the particularity of the allegations required in these statements is because in the event of no contest being brought, or exceptions subsequently taken in the circuit court, they form the basis for the final adjudication of the rights therein described, considered in such case as admitted and proven and together with such other evidence as the claimant may offer in his behalf, and the record of water measurement, data, and investigations submitted by the State Engineer, constitute the record in the case upon which the circuit court bases its decree.

Who Must Appear.—Only those claimants who have been duly served or who have appeared in the proceeding are bound by the decree. Unknown claimants are not bound, nor known claimants who have not appeared or been served with notice. (*In Re Willow Creek*, 74 Ore. 492, 614, 617, 618.) But claimants who have been duly served must appear, or be deemed in default. A failure of a claimant to appear and submit his claims when duly served, bars his right to assert such claims thereafter "to the same extent that a party is barred who makes default after service of summons in a proceeding at law." (*Pacific Live Stock Co. v. Cochran*, 73 Ore. 417, 428.)

Service includes publication as required by the act and the sending of a notice by registered mail to the claimant's post office address, as far as the same can be reasonably ascertained. (*In Re Willow Creek*, *supra*, p. 620.) The provisions for notifying claimants do not conflict with the State Constitution. (*In Re Willow Creek*, *supra*.)

Original Hearings.—At the time and place designated in the notice, each claimant is required to appear and submit proof of his right, consisting of the statement of proof and such other evidence as he may offer in support of his claim. The statement is required to be under oath (Sec. 15) and

the Superintendent is authorized to administer the oath. The testimony is taken by the Superintendent (Sec. 16). These hearings are entirely *ex parte* in nature, no adversary pleadings or statements being filed, or proceedings between adverse claimants provided for at this stage of the proceeding. Each claimant is confined to proof of his own rights, without regard to the claims or rights of other claimants.

State Engineer's Duties.—Meanwhile, the State Engineer (Sec. 23) proceeds at the time set forth in the notice, to make an investigation of the stream and canals and ditches therefrom, including the measurement of the stream and carrying capacity of the canals or ditches, and to make a survey of the lands irrigated or susceptible of irrigation from the various ditches, and to gather such other data and information as may be essential to an understanding of the relative rights of the claimants. These observations and measurements are reduced to writing and made a matter of record in the office of the State Engineer, and maps or plats of the stream, ditches, and lands irrigated or susceptible of irrigation from such ditches, are prepared. Certified copies of these observations, measurements, and maps of record in such office, are subsequently filed with the Board, and constitute a part of the record of the proceeding. (Section 24, as amended, General Laws of Oregon for 1913, Chap. 97, p. 161.) Such maps, plats, and records of the investigation made by the State Engineer are *prima facie* evidence of the matters therein contained. (*In Re Willow Creek*, 74 Ore. 592, 628.)

Fees.—At the time of submitting his proof, the claimant is required to pay certain fees (Sec. 17), depending upon the area of land irrigated by him for which a right is claimed. No other fees are required to be paid, and the proceeding is conducted entirely at public expense, these fees being intended to partially reimburse the State for its expenditures. The section providing for these fees has been held in conformity with the State Constitution, and not to deprive the claimant of his property without due process of law, in the case of *Pacific Live Stock Co. v. Cochran*, 73 Ore. 417. Section 21, requiring deposits to cover the cost of taking testimony in cases of contests, has been repealed. (Gen.

Laws, 1913, Chap. 86, Sec. 7, p. 138.) The expense of taking this testimony is now borne by the State without further reimbursement than the fees paid under Section 17.

Inspection of Claims.—At the conclusion of the *ex parte* hearings, the Superintendent is required to open all the evidence and proofs taken by him to public inspection, for a period of not less than ten days. (Sec. 18.) Notice of the time and place for such inspection must be given to the various claimants by registered mail more than ten days prior to the period for inspection.

In this notice, the circuit court in which the Board's determination will be heard must be set forth.

The purpose of this provision is to enable each claimant to examine the proofs and claims of other claimants and determine whether any thereof conflict with his right. If adverse claims have been made, he is then permitted to file a contest with the Superintendent, and have the conflicting claims determined in the first instance by the Board, before proceedings are instituted in the circuit court.

Contests.—If a claimant desires to object to any other claim made before the Board, he must, within five days after the period for inspection closes, file with the Superintendent a notice of contest, verified, and setting forth the grounds of contest with reasonable certainty.

However, by failing to file such contest before the Board the claimant does not waive his right to object to the allowance of another's claim in the circuit court. He may, if he desires, although he has not contested a claim, file exceptions after the proceeding is instituted in the circuit court, and have the matter in dispute determined in that court. (*In Re North Powder*, 75 Ore. 83.) It is, therefore, entirely optional with the claimant whether he contests the adverse claim by the Board, or waits until he may accomplish the same object by taking exceptions to the Board's findings in the circuit court, if the adverse claim is allowed.

Hearing of Contests.—The Superintendent is required to give notice of the time and place for hearing contests filed with him. The notice to the party contested is required to be served in the same manner as summons in suits or actions in the circuit court.

The purpose of these hearings is to take the testimony offered by the respective parties to contest, not for decision by the Superintendent, but as a part of the record of the entire proceeding.

These contests are not separate suits in any sense, but involve as incidental to the main proceeding the determination of certain questions in which other claimants may not be directly interested. No decision of the contest is made as a separate proceeding, but the testimony taken is merged in and becomes a part of the whole record, upon which the Board's findings and the final decree of the court are based. No relief, as by injunction, is afforded the contestant.

The Superintendent, at the hearing of contests, is authorized to issue subpoenas, and compel the attendance of witnesses, and such witnesses to testify. (Sec. 20.)

Findings of the Board.—Upon the completion of the taking of testimony in contests, the Superintendent is required to transmit the same to the Board, where it is filed.

The State Engineer is required to file with the Board a certified copy of the records in his office made as a result of his investigations. The statements of claim, *ex parte* evidence, contest testimony, and the information certified to the Board by the State Engineer constitute the record before the Board, upon which it is to base its findings and determination.

The Board then prepares its findings and an order of determination, and enters these of record in its office, determining the several rights to the waters of the stream system involved.

The findings of the Board are not final in character, but are *prima facie* final and binding until modified by the circuit court. (*In Re Willow Creek*, 74 Ore. 592, 610, 611.)

For purposes of administrative control and supervision, the findings of the Board are in full force and effect from the date of their entry in the Board's records. Although not final, nor conclusive, the findings are in effect and are *prima facie* correct for administrative purposes. No power to take charge of the distribution of water is given, however, until the Board has filed its findings in the circuit court, and the matter is there pending. (Sec. 28.)

Court Procedure.—After the entry of its findings, the Board is required to file the record before it, with a certified copy of its findings, as of record in its office, in the circuit court of the county wherein the adjudication will be made. (Sec. 24, as amended, Gen. Laws of Oregon for 1913, Chap. 97, p. 161.) Thereupon the Board must procure an order from such court fixing a time for a hearing on the determination of the Board, which hearing shall be at least forty days subsequent to the date of the order. The clerk of the court is required "forthwith" to forward a certified copy of the order to the secretary of the Board, by registered mail, and the secretary is required "immediately upon receipt thereof" to notify by registered mail each claimant who has appeared of the time and place of such hearing. The secretary is then required to file proof of service with the court "as soon as possible."

The proceeding thus instituted in the circuit court is judicial in character, and is like a suit in equity, as nearly as practicable.

Exceptions.—Any claimant may file exceptions to the findings of the Board, stating the grounds thereof with reasonable certainty. Service of exceptions must be made on parties who were adverse parties to contests before the Board. Exceptions may be taken as against claims allowed or confirmed by the Board, which were uncontested before the Board. (*In Re North Powder, supra.*)

In case no exceptions are filed, the court must enter a decree confirming the determination of the Board.

In case of exceptions, a hearing is appointed by the court at a later date, at which all parties may be heard, and the State of Oregon may be represented by a member of the Board, or by the Attorney General.

The court may remand the case for further testimony, either to the Superintendent, or to a referee, and may require a further determination by the Board.

Final Decree.—After final hearing in the circuit court, the court is required to enter a decree, affirming or modifying the order of the Board. This decree (except on appeal or in case of a rehearing) adjudicates and finally determines the rights of all claimants made parties. It is conclusive

"as to all prior rights and the rights of all existing claimants upon the stream or other body of water" involved. (Sec. 33.)

Appeals may be taken to the Supreme Court of the State as from other decrees of the circuit court.

Rehearing.—Within six months from the date of such decree, or after the decision of the Supreme Court on an appeal therefrom, the Board or any interested party may apply to the circuit court for a rehearing. (Sec. 30.)

The decree, therefore, does not become absolutely final until the expiration of this period.

Reopening Decree.—It is further provided that a claimant who has not been served with notice and has had no knowledge of the pendency of the proceedings may intervene at any time prior to the expiration of one year after the entry of the Board's determination. (Sec. 34.)

Injunctions.—After the rights to a stream system have been determined, the right to injunction, although confirmed by the act, is limited to a certain extent. No restraining order may be granted before a hearing is had until after at least three days' notice to all defendants, and the suits must be heard not later than fifteen days after issues are joined, unless for good cause shown further time is required. (Sec. 64.)

(G) *Water Right Record*

Sections 25 and 53 provide for the issuance of water right certificates and the recording thereof in the records of the Board and in the county in which the water right is located.

The county clerk is required to keep a book especially prepared for recording these certificates. (Sec. 25.)

Two classes of certificates are provided for. The certificate described in Section 25, is issued to those claimants whose rights have been determined by final decree in the proceedings provided for by the act, which rights were initiated prior to the enactment of the Water Code.

The certificate provided for by Section 53, is issued to an applicant for a water right under the code, who has completed his appropriation and has made proof thereof to the State Board. This certificate is not based upon a decree, but upon an administrative determination of completion of

appropriation, similar to those determinations made in the Federal Land Department prior to issuance of patent to government land under the public land laws.

These certificates, and the final decrees on which based, with other records of stream discharge and maps of irrigated lands, etc., make up a complete record of water titles in the office of the Board, for the use of the general public.

(H) *Procedure Governing Appropriation of Water*

Sections 45 to 54 of the act relate to the method whereby a water right may be acquired by appropriation in conformity with the act, where the water is subject to appropriation. All rights acquired under these provisions are subject to existing rights (Sec. 1) and vested rights cannot be impaired by the granting of a permit to an applicant. (Sec. 70.)

The method of appropriation here provided for is an exclusive one, and hence appropriations by mere diversion and use are no longer recognized in this State, except as initiated or vested prior to the passage of this act. Section 1 provides that water may be appropriated as in the act provided "and not otherwise." Section 45 provides a penalty for wilful diversion or use of water to the detriment of others, without compliance with the act. Section 66 provides that unauthorized use of water to the detriment of another, or the use, storage, or diversion of water without a permit, shall be a misdemeanor.

The procedure consists of an application to the State Engineer, in writing, setting forth certain required information, and the issuance of a permit by that official, which is recorded in his office. Subsequently the applicant must construct the necessary diversion works with diligence, complete them within a certain time, fixed in the permit, and make beneficial application of water within a time also fixed. Proof of completion of appropriation must be made, and a water right certificate, issued by the Board, finally confirms the right.

The State Engineer is required to refuse to grant permits which conflict with determined rights or where the proposed use is a menace or detrimental to the public safety,

welfare, or interest. (Sec. 47, as construed in *Cookinham v. Lewis*, 58 Ore. 484, 494, 495.)

(I) *Distribution of Water*

Provision is made for the distribution of water in accordance with determined rights.

Sections 36 to 44, inclusive, and Sections 59, 63, 64, 66, and 67, provide for a system of local control over distribution.

Water Districts.—For purposes of administrative control, the State is divided into two divisions, each of which is subdivided into water districts. The Division Superintendent is the chief administrative officer in the division, and has the supervision of the distribution therein, and the Water Masters in immediate charge of the work. The State Board has supervisory control over the distribution throughout the State.

Water Masters.—In each district a Water Master is appointed. The Water Master is a police officer, with power of arrest. (Sec. 44.) It is his duty to divide the water among those entitled thereto, as determined by the decrees in force, to prevent waste, and to regulate headgates and measuring devices. It is made a misdemeanor to interfere without authority with a headgate which has been established, or to divert water which the Water Master has ordered to be left in the stream. (Sec. 43.) Any person who has been injured by the act of the Water Master may obtain an injunction in the circuit court. Injunctions are to be issued in such cases only where the Water Master has failed to carry into effect the order of the Board or decree of the court.

Power to Control Distribution.—The State Board has no authority or power to assume charge of or control over distribution of the waters of a stream system, until after the rights thereto have been determined by the Board, the determination has been entered of record in the office of the board, and filed with the circuit court wherein the adjudication is to be made. The determination of the Board is in full force and effect from its entry in the Board's records (Sec. 24), but authority is not thereby conferred to assume control over the stream. Section 28 provides that

distribution shall be made in accordance with the order of the Board during the time the determination of the Board is pending in the circuit court, and until final decree.

At any time after the Board has entered its order of determination, any party may file a bond in the circuit court "wherein such determination is pending," and thereby stay the operation of the Board's determination, in whole or in part (Sec. 29).

After the decree has been entered, and transmitted to the Board, the distribution must be made in accordance with such decree.

Prior Decrees—The Board has no authority to enforce any other decrees, except in certain cases upon request of the court, than those entered in the proceedings provided for by the act. Prior decrees, made in other suits are *res adjudicato*, as between the parties, and after a determination has been made embracing the waters involved in such prior decrees, the rights established thereby may be enforced by the Board. Until determination proceedings have been had, however, such prior decrees are to be enforced by the courts making them (*Wattles v. Baker County*, 59 Ore. 255, 261), except where the Water Master is required to take charge by request of the court. (Sec. 63, Amended Laws, 1913, Chap. 86, p. 140, Sec. 4.)

Section 70 (Subdivision 4) provides that the act shall not affect relative priorities to the use of water as between parties to decrees rendered in causes determined or pending prior to the passage of the act.

A decree rendered prior to determination proceedings by the Board is conclusive and binding on the parties and their successors in interest, both as to priority and quantity of water allowed by such decree (*Claypool v. O'Neill*, 65 Ore. 511), and the Board cannot ignore such prior decrees in making its findings.

Powers of Superintendent and Appeals—The Superintendent of the Division has "general control over the Water Masters of the district within his division," and has authority to "make such reasonable regulation to secure the equal and fair distribution of water in accordance with determined rights as may be needed in his division," consistent with the laws of the State. (Sec. 4.)

Any person aggrieved by any order or regulation of the Superintendent may appeal to the Board, which, "after due notice," shall hear the testimony offered by the appellant and may "suspend, amend or confirm the order complained of." (Sec. 5.)

Appeal from Board—The decisions of the Board in all matters coming before it are subject to appeal to the circuit and Supreme courts. (Sec. 9.)

A clear and concise statement of the provisions of the code relative to water right determinations is made in the case of *In Re Silvies River*, 199 Fed. 495, which was decided, however, prior to the several amendments hereinbefore referred to.

DECISIONS OF THE SUPREME COURT OF OREGON

The Supreme Court of the State has rendered many decisions involving the relative rights of riparian owners and appropriators, and defining the rights of water users, both as appropriators and as riparian owners. The following is a list of these cases, the leading cases being indicated by asterisks:

**Andrews v. Donnelly*, 59 Ore. 138; *Beers v. Sharpe*, 44 Ore. 386; *Boyce v. Cupper*, 37 Ore. 256; *Bolter v. Garrett*, 44 Ore. 304; **Bowen v. Spaulding*, 63 Ore. 392; *Bowman v. Bowman*, 35 Ore. 279; **Brown v. Baker*, 39 Ore. 66; *Britt v. Reed*, 42 Ore. 76; *Brosnon v. Harris*, 39 Ore. 148; *Carson v. Hayes*, 39 Ore. 97; *Carnes v. Dalton*, 56 Ore. 596; *Cantrell v. Sterling M. Co.*, 61 Ore. 516; **Claypool v. O'Neill*, 65 Ore. 511; **Carson v. Gentner*, 33 Ore. 512; **Caviness v. La Grande Irr. Co.*, 60 Ore. 410; *Cole v. Logan*, 24 Ore. 304; **Cookinham v. Lewis*, 58 Ore. 484; *Curtis v. La Grande Water Co.*, 20 Ore. 34; *Coz v. Bernard*, 39 Ore. 53; *Coffman v. Robbins*, 8 Ore. 278; *Davis v. Chamberlain*, 51 Ore. 304; *Dodge v. Marden*, 7 Ore. 456; *Dalton v. Kelsey*, 58 Ore. 250; **Donnelly v. Cuhna*, 61 Ore. 72; **Gardner v. Wright*, 49 Ore. 609; *Glaze v. Frost*, 44 Ore. 29; *Garrett v. Bishop*, 27 Ore. 349; **Hedges v. Riddle*, 63 Ore. 257; *Hedges v. Riddle*, 75 Ore. 197; *Hallock v. Sutor*, 37 Ore. 9; *Harrington v. De Maris*, 46 Ore. 111; **Hough v. Porter*, 51 Ore. 318; **Hindman v. Rizor*, 21 Ore. 112; *Huston v. Bybee*, 17 Ore. 140;

**Ison v. Sturgill*, 57 Ore. 109; **In Re Willow Creek*, 74 Ore. 592; **In Re North Powder*, 75 Ore. 83; **Jones v. Conn*, 39 Ore. 41; **Kaler v. Campbell*, 13 Ore. 596; **Little Walla Walla Irr. Co. v. Finis*, 62 Ore. 348; **Low v. Rizor*, 25 Ore. 551; **Low v. Schaffer*, 24 Ore. 239; **Lavery v. Arnold*, 36 Ore. 84; **Lewis v. McClure*, 8 Ore. 273; **McCall v. Porter*, 42 Ore. 49; **McRae v. Small*, 49 Ore. 595; **Mann v. Parker*, 48 Ore. 321; **Mattis v. Hosmer*, 37 Ore. 523; **McCoy v. Huntley*, 60 Ore. 372; **McPhee v. Kelsey*, 44 Ore. 193; **McMahon v. Olcott*, 65 Ore. 537; **Morrison v. Officer*, 48 Ore. 569; **Moss v. Rose*, 27 Ore. 595; **Nevada Ditch Co. v. Bennett*, 30 Ore. 59; **North Powder M. Co. v. Coughanour*, 34 Ore. 9; **Nevada D. Co. v. Canyon, etc., Co.*, 58 Ore. 517; **Oregon Const. Co. v. Allen D. Co.*, 41 Ore. 209; **Porter v. Pettingill*, 57 Ore. 247; **Parkersville Dist. v. Wattier*, 48 Ore. 332; **Pringle, etc., Co. v. Patterson*, 65 Ore. 474; **Porter v. Small*, 62 Ore. 588; **Pacific Live Stock Co. v. Cochran*, 73 Ore. 417; **Seaward v. Pac. L. S. Co.*, 49 Ore. 157; **Sherred v. Baker City*, 63 Ore. 28; **Smyth v. Neal*, 31 Ore. 105; **Schollmeyer, In Re*, 69 Ore. 210; **State v. Small*, 49 Ore. 595; **Simpson v. Harrah*, 54 Ore. 448; **Seaward v. Duncan*, 47 Ore. 640; **State ex rel. v. Lavery*, 31 Ore. 77; **Simmons v. Winters*, 21 Ore. 35; **Speake v. Hamilton*, 21 Ore. 4; **Turner v. Cole*, 31 Ore. 154; **Whited v. Cavin*, 55 Ore. 98; **Williams v. Altnow*, 51 Ore. 275; **Wimer v. Simmons*, 27 Ore. 2; **Watts v. Spencer*, 51 Ore. 262; **Wattles v. Baker County*, 59 Ore. 255.

We summarize the leading principles as laid down in these cases as follows:

1. *The Common Law.*—The common law prevails in this State only in so far as it is applicable to the conditions here existing and the necessities of the people. (*Carson v. Gentner*, 33 Ore. 512, 515.) It has not been adopted by ^{Statutory} constitutional provisions, as in California, and some other states (*Lux v. Haggin*, 69 Cal. 255), but has been applied so far as applicable to the circumstances and conditions in this State, by the courts of the State.

2. *Rights of Appropriation.*—The doctrine of appropriation has been recognized and applied from the earliest times. (*Dodge v. Marden*, 70 Ore. 456.) The rights of the prior appropriator are paramount. (*Andrews v. Donnelly*, 59 Ore. 138, 147.) The right to appropriate water is not con-

fined to an exercise thereof on public lands, but may be exercised generally, wherever water is available for use, and lawful access to the stream or source of supply can be gained for that purpose. (*Caviness v. La Grande Irr. Co.*, 60 Ore. 410, 423, 424.) "Concerning the mere diversion and use of water there is no difference between a non-riparian appropriator and a riparian user, provided the former has a lawful right of access for that purpose to the stream from which the diversion is made. * * * The deduction, then, is that if any one can lawfully gain access for that purpose to a non-navigable stream, and water is there not subject to use by another, such a one may appropriate it for his own use." (*Idem.*)

A prior appropriator can claim no more water than is necessary for the purposes of his appropriation. (*Simmons v. Winters*, 21 Ore. 35, 51; *Andrew v. Donnelly*, 59 Ore. 138, 147.) Water, in the arid part of the State, is "the life of the land," and "the time when water may be used recklessly or carelessly has passed in this State. With increasing settlement, water has become too scarce and too precious to justify any but an economical use of it." (*McCoy v. Huntley*, 60 Ore. 372, 375, 376.)

For irrigation, "the quantity of water acquired by appropriation must be determined by the amount of land irrigated and the quantity of water needed therefor" (*Porter v. Pettingill*, 57 Ore. 247, 250), and wasting water is no longer tolerated, in view of the necessity for the development of the arid region of the State by the extended use of water. (*Donnelly v. Cuhna, supra*, 76.) The water right thus acquired is appurtenant to the land (*Porter v. Pettingill, supra*, 250; *In Re North Powder*, 75 Ore. 83, 92), and when the water is not needed or required by the prior appropriator, he cannot complain if it is diverted and used by subsequent appropriators, in their priority order. (*Hough v. Porter*, 51 Ore. 318, 438.) And this principle has been extended so as to require rotation in the use of water, as between prior and subsequent appropriators, so as to increase the duty of the water. (*McCoy v. Huntley, supra*, 376; *Cantrall v. Sterling M. C.*, 61 Ore. 516, 526.) "It is the policy of the law that the best methods should be used and no person allowed more water than is necessary, when

properly applied, and thus a larger acreage may be made productive by its extended application." (*Little Walla Irr. Co. v. Finis*, 62 Ore. 348, 352.) "In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. * * * The wasteful methods so common with early settlers can, under the light most favorable to the system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such method of use was acquired thereby." (*Hough v. Porter*, 51 Ore. 318, 420.)

3. *Riparian Rights*.—The common law rule of riparian rights has been recognized as applicable in this State "only to a limited extent" (*In Re Willow Creek*, 74 Ore. 592, 623), and, for irrigation purposes, such rights are appurtenant only to lands which passed from the federal government into private ownership prior to March 3, 1877. Riparian rights and the rights of appropriators may exist upon the same stream, and be exercised as such (*Davis v. Chamberlain*, 51 Ore. 304, 311), but if a riparian owner appropriates the water of a stream flowing through his lands, his rights are measured and determined by the needs of his appropriation, and he can claim no rights in the surplus waters as against subsequent appropriators. (*Williams v. Altnow*, 51 Ore. 275, 300.) When a riparian owner, therefore, appropriates the water, he is deemed and held to have abandoned his riparian rights, and must "stand or fall" as an appropriator. (*In Re Schollmeyer*, 69 Ore. 210, 212; *Bowen v. Spaulding*, 63 Ore. 392, 395.)

"It is difficult to discern any difference in principle between the rights of a riparian proprietor and those of an appropriator in the beneficial use of water" (*McCoy v. Huntley*, 60 Ore. 372, 376), and, although riparian rights may have attached, yet if there is a surplus of water available for use, a non-riparian owner may appropriate such surplus, provided he has the lawful right of access to the stream. "Primarily, any use of the water of a natural stream for a beneficial purpose is free to him who has an opportunity to take it without infringing upon the property rights of another," and if "any one can lawfully gain access to a non-navigable stream, and water is there not subject to

use by another, such a one may appropriate it for his own use." (*Caviness v. La Grande Irr. Co.*, 60 Ore. 410, 424.) A riparian owner cannot lay claim to the undiminished flow of the stream without actual use, as against non-riparian appropriators, and his right is "limited to the amount of water needed and used." (*In Re Willow Creek*, 74 Ore. 592, 625, 626.)

4. *Abrogation of Common Law Rule.*—The Desert Land Act, of March 3, 1877, abrogated, in the State of Oregon, the doctrine of riparian rights, so far as the then public lands of the United States were concerned. Riparian owners, whose lands were acquired from the government by settlement, entry or patent subsequent to March 3, 1877, in this State are entitled as such to a quantity of water reasonably essential for their domestic uses and the watering of an ordinary number of stock; but, for irrigation purposes, such owners are entitled to the use of the water of a stream flowing through their lands only in the event they have appropriated the same, and such appropriation is limited in each case to the amount actually diverted and used for necessary irrigation purposes. The use of the waters of such streams is open to non-riparians for such purpose, equally with such riparian owners, whenever a surplus of water remains after the domestic and stock needs and requirements of the riparian owners have been satisfied. (*Hough v. Porter*, 51 Ore. 318, 399, 403, 404, 405, 416, 417; *Hedges v. Riddle*, 63 Ore. 257, 260; *Williams v. Altnow*, 51 Ore. 275, 298; *Pacific Live Stock Co. v. Davis*, 60 Ore. 258.)

The decision in *Hough v. Porter*, *supra*, was said, in *Boquillas L. & C. Co. v. Curtis*, 213 U. S. 339, to rest "upon plausible grounds."

5. *State Control.*—The right of the State to regulate and control the diversion and use of water, and the distribution and division thereof, both as to subsequent appropriations, and prior vested rights of appropriation, and riparian rights, and the public interest in irrigation and other uses of water, have been recognized in the following cases, which construe and interpret various provisions of the "Water Code," and like legislation: **Cookinham v. Lewis*, 58 Ore. 484; *Pacific Live Stock Co. v. Davis*, 60 Ore. 258; **McMahon v. Olcott*,

65 Ore. 537; *In Re Schollmeyer*, 69 Ore. 210; *Claypool v. O'Neill*, 65 Ore. 511; *Pringle Falls E. P. Co. v. Patterson*, 65 Ore. 474; **Wattles v. Baker County*, 59 Ore. 255; **In Re Willow Creek*, 74 Ore. 592; **In Re North Powder River*, 75 Ore. 83; **Pacific Live Stock Co. v. Cochran*, 73 Ore. 417.

6. *Distribution of Water*.—As among riparian owners, having rights as such to the use of water for irrigation and other purposes, beneficial use is in all cases the basis, measure and limit of the right. In the use of water as among riparian owners, the usual rules applicable under the common law, are enforced, the rights of such owners being equal and correlative, and one having no priority over another, save by prior appropriation.

On a stream to which riparian rights attached prior to March 3, 1877, the use of the water is not confined to the riparian owners if there is more water than needed and actually used by them for their beneficial purposes, but surplus waters are open and subject to appropriation and use by non-riparian owners; and, if such riparian owners, or any of them, claim as appropriators, thereby waving riparian rights, no superiority because of riparian ownership is recognized as against non-riparian appropriators, but the rights of all, regardless of the location of the lands of such claimants, are determined upon the basis of priority and beneficial use. (*In Re Willow Creek*, *supra*; *In Re Schollmeyer*, *supra*; *Caviness v. La Grande Irr. Co.*, *supra*.)

7. *Effect of State Legislation Upon Riparian Rights*.—The Water Code recognizes the existence of riparian rights in this State (*Pacific Live Stock Co. v. Davis*, 60 Ore. 258, 259) to the extent that riparian rights existing at the time the act took effect and recognized prior to the act (Sub. 8, Sec. 70) had become vested by "actual application of water to beneficial use * * * by or under authority of any riparian proprietor," or (Sub. 3, Sec. 70) in those cases where a riparian proprietor was at the time of the passage of the act, "engaged in good faith in the construction of works for the application of water to beneficial use." (*In Re Willow Creek*, 74 Ore. 592, 628.)

Chapter 279, General Laws of Oregon for 1913, provides that, "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State."

THE PURPOSES OF THE SUIT AND BILL OF COMPLAINT

The purposes of this suit apparently are: First, to enjoin the members of the State Water Board from proceeding further with the determination of rights to the waters of Silvies River, under the provisions of the Water Code, upon the theory that, if the proceeding is administrative, it is violative of the provisions of the Fourteenth Amendment to the Federal Constitution, and in such case, the Board not being a court, the members thereof may be restrained, Section 720 of the Revised Statutes not being applicable; and, second, if the proceeding is judicial, then to enjoin the defendants other than the members of the Board from proceeding further in the determination proceedings, upon the theory, first, that the proceeding has been properly removed to the Federal Court, and is there pending; and, second, that prior suits are pending in the Federal Court, to which certain of the defendants herein are parties; and there is consequently a conflict of jurisdiction between the State and Federal courts, which should be decided in favor of the Federal courts.

THE POSITION AND CONTENTION OF THESE APPELLEES

The position assumed and contentions relied on by the appellees, members of the State Water Board, may be outlined as follows:

1. The proceeding is administrative in character, pending before an administrative board, the statute is a valid exercise of the police power, notice and hearing are afforded, and the equal protection of the laws is guaranteed, and there is consequently no violation of the provisions of the Fourteenth Amendment.

2. A bill in equity to restrain the members of the State Water Board, and these other defendants, is not a proper method of reviewing the action of the Federal District Court in remanding the proceeding to the State Board.

3. If, however, that question might be here raised, the order of the Federal District Court, remanding the proceed-

ings to the Board, was properly made, since that court could not entertain jurisdiction, for the reason that the proceedings were administrative, there was no separable controversy between appellant and the petitioners for the proceedings, and the State was a necessary party to the proceedings.

4. The defendants, other than the State Water Board, should not be enjoined from protecting their rights before the Board, and State court, in said proceedings, because prior suits are pending in the Federal courts to which those defendants were parties.

Argument

I

THE PROCEEDINGS TO DETERMINE WATER RIGHTS PROVIDED FOR BY THE STATUTES OF OREGON, WHILE PENDING BEFORE THE STATE WATER BOARD, ARE ADMINISTRATIVE IN CHARACTER, THE STATUTORY PROVISIONS THEREFOR ARE A VALID EXERCISE OF THE POLICE POWER OF THE STATE, AND SINCE A HEARING AND SUFFICIENT NOTICE ARE PROVIDED FOR, THE STATUTES ATTACKED DO NOT CONFLICT WITH ANY PROVISION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Re Willow Creek, 74 Ore. 592, 610, 613, 614, 617; 144 Pac. 505.

Farmers' In. Co. v. Agr. D. Co., 22 Colo. 513; 45 Pac. 444.

Farm Inv. Co. v. Carpenter, 9 Wyo. 110; 61 Pac. 258.

Louden v. Handy D. Co., 22 Colo. 102; 43 Pac. 535.

Farmers' Land Co. v. Frank, 72 Neb. 136; 100 N. W. 286.

Willey v. Decker, 11 Wyo. 496; 73 Pac. 210.

Cookinham v. Lewis, 58 Ore. 485, 498; 114 Pac. 88; 115 Pac. 342.

Wattles v. Baker County, 59 Ore. 255, 261; 117 Pac. 417.

In Re Silvies River, 199 Fed. 495.

Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 385.

Pacific Live Stock Co. v. Cochran, 73 Ore. 417; 144 Pac. 668.

Combs v. Farmers', etc., Co., 38 Colo. 420; 88 Pac. 396.

Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278.

Crawford v. Hathaway, 67 Neb. 325; 93 N. W. 794.

Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121, 171; 138 N. W. (Neb.), p. 179.

Pacific Live Stock Co. v. Lewis, 217 Fed. 95.

Anderson v. Kearney, 37 Nev. 314; 142 Pac. 803.

Ormsby v. Kearney (same case).

McCook, etc., Co. v. Crews, 70 Neb. 115.

(A) The Police Power.—The determination and adjudication of existing rights is a necessary and essential part of the regulation and control which the State has assumed over its waters in the interest of the people of the State, and the statutory proceedings provided for by the legislation attacked by appellant are well within the police power of the State and a necessary prerequisite to the orderly distribution of the waters of the State among those entitled thereto.

As we have already explained, in Oregon both the common law doctrine of riparian rights (to a limited extent) and the arid region doctrine of appropriation are recognized and applied, not only in the same locality, but upon the same stream. Both rights have existed and have been recognized from the earliest times.

The right of the State to adopt either doctrine to the exclusion of the other, or a combination of both doctrines, can not be questioned. It is not questioned seriously by anyone that a state may adopt a system of laws for the purpose of controlling and regulating the use of the waters within the State, free from interference from the Federal Government, so long as the property and rights of the latter government are not involved. Nearly every Western State has adopted a system of laws for this purpose, which have been termed "Water Codes" or "Irrigation Codes," and these laws have been in force and operation for many years. The purpose of these statutes is: *First*, to provide a method for the determination and adjudication of water rights existing at the time of the adoption of the statutes, and for their protection as vested rights; *second*, to govern and control the acquirement of water rights in the future; and, *third*, to secure the orderly division and distribution of the waters of the State among those found entitled to its use, under the supervision of State officials. The primary object

of these laws is to regulate and control the distribution and use of the water. The provisions for adjudicating existing rights, and for a method controlling the acquirement of future rights, are ancillary to that end or purpose. The incidental (but valuable) features of these laws are that they provide a complete record of water rights, kept and maintained in a public office, for the benefit of the public. This system of State control, substantially as it exists in Oregon under the present laws, is in force in nearly all the arid region states.

It is well settled by the decisions of the courts of all the Western States that a title to a water right is not perfect in any claimant until there has been an adjudication and determination thereof and a final decree designating the owner of the right and defining the nature and extent thereof, and thereby establishing a permanent record whereby future distribution of the water may be made. Until such determination is made, no distribution can be made and no control assumed by the State. Adjudication of existing rights is essential to determine, first, the priority of the right, and, second, the extent thereof.

Accordingly, the object of statutory proceedings to determine water rights is correctly stated in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 148, 50, L. R. A. 747, 87 Am. St. Rep. 918, as follows:

* * * for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters.

In the case of *Montezuma Canal v. Smithville Canal*, 218 U. S. 371, 385, the court was considering a suit brought in an Arizona court to determine water rights. It was held that the court had authority to appoint a commissioner to take charge of the distribution of the water under the decree. The court said:

It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance

to legislative provisions enacted in some of the states where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See Part IV, Wiel's *Water Rights in the Western States*, 2d edition, pp. 590 *et seq.* The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Investment Company v. Carpenter*, 9 Wyo. 110. "to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water."

And it was held that:

In view of the absence of legislative action on the subject and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with the decree,

the court was authorized to appoint a water commissioner to take charge. (P. 385.)

It is now generally understood that two things are essential to the protection of vested rights to the use of water from natural sources: *First*, the limitation of the right to actual needs, for some beneficial use; and, second, a system of public control, which will guarantee to the owner of a valid water right the proper enjoyment thereof. The rules which govern the rights of riparian owners in Western States require equally, with those governing appropriations, administrative control. (See Wiel, *Water Rights*, 3 ed., Vol. I, Sec. 756, p. 830.)

State legislation, therefore, which has for its object this necessary control over the diversion and use of the waters of natural streams is in the interest of the public, and a valid exercise of the police power, and so the courts of the Western States have held with one accord.

It was said in *White v. High Line, etc., Co.*, 22 Colo. 191, 197:

From the very nature of the business, controversies with reference to the use of water naturally lead to unseemly breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of

water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulation may properly be based upon the principle that when private property is "affected by a public interest," it ceases to be *juris privati* only.

And in *Farm Investment Co. v. Carpenter, supra*, the court said (p. 140) :

The water to which the use of each attaches is public and the people as a whole are intensely interested in its economical, orderly and inexpensive distribution. It is a matter of public concern that the diversions shall occur with as little friction as possible and that there shall be such reasonable and just use and conservation of the water as shall redound more greatly to the general welfare and advance material wealth and prosperity.

A state has general control over all property and persons within its territorial limits. One of the great powers of the state peculiar to its sovereignty and which has never been granted away is the police power, and in the exercise of this power it must necessarily assume control over all private property within the boundaries of the state. Property rights in water, either at common law, or under the arid region doctrines, are rights of use, and each right of use, whether by appropriator or riparian owner, must be exercised without substantial detriment or injury to the rights of others and the general public. Because it is essentially a right of use of a thing incapable of permanent private ownership, it differs materially from property rights in things which may be possessed or occupied without use thereof. The requirement that there must be some public control or direction of the use of a thing in which there is a common interest or right of use of several, is more manifest than in the case of a thing merely possessed or occupied.

The authority of a state to control property under its general police powers is stated thus in the case of *Commonwealth v. Alger*, 7 Cush. 53, 84 (quoted with approval in *Holden v. Hardy*, 169 U. S. 366, 392) ;

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified

may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

The right of the state to exercise its police powers in the control and regulation of those things in which a common right of use exists as among several individuals, for the benefit of all, has long been recognized by this court, and for the purpose of protecting the common property and regulating and controlling it, the state is often considered as representative of the people or of the common owners. This principle has been frequently applied to natural oil and gas, in which a "co-equal right" in all the landowners to take from the common source of supply a proportionate part thereof existed. In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, it was said:

Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession and to reach the like end by preventing waste. * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law * * * which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.

The same principle was applied in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 77, where natural mineral springs were involved. The statute there questioned was held to regulate the exercise of the common right of the several landowners so as reasonably to conserve the interests of all who possessed the right, and it was said:

That the state, consistently with due process of law, may do this is a necessary conclusion from the decision in the case cited. But were the question an open one we still should solve it in the same way.

The rule undoubtedly is that the state has an interest in its natural resources, and under its police powers may protect the same. This is well illustrated in the case of *Hudson County Water Co. v. McCarter*, 209 U. S. 349, wherein the Supreme Court of the State of New Jersey was affirmed. In that case the legislature of New Jersey enacted a statute providing that it should be unlawful to conduct the waters of streams, lakes, etc., out of the State of New Jersey into another state for use therein, and it was provided that the state might enforce this statute through the equity courts. The plaintiff in error, having laid mains in New Jersey, to conduct the waters of the Passaic River, in that state, into the State of New York, proceedings were brought under the statute by information by the Attorney General of the State of New Jersey, on behalf of that state, in the courts of New Jersey, to restrain the defendant from so diverting the water of the Passaic River into New York State. The lower court (70 N. J. Eq. 525, 528) rested its decision largely upon the ownership by the state of the bed of the Passaic River as a tidal stream, and as a riparian owner along said stream, and the consequent public interest therein, and that there was a residuum of public interest in such waters, after the rights of riparian owners were satisfied. But the Supreme Court of the United States, without attempting to revise or consider the opinion of the New Jersey court, placed its decision, as it said, "upon a broader ground than that which was emphasized below," and independent of the residuum of title" claimed for the state in the lower court. After considering the police powers of a state, Mr. Justice Holmes, in delivering the opinion, said (p. 355):

It sometimes is difficult to fix the boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.

And, at page 356, the opinion, continues :

We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.

And it was, therefore, held that a riparian owner might be restrained from diverting the waters of the stream passing his lands into another state, in a proceeding by or on behalf of the state, without in any way violating the provisions of the Fourteenth Amendment.

Statutory proceedings to adjudicate water rights are, as we have said, a necessary part of a system of state control, and consequently incidental to the proper exercise of the police power of the state. Similar statutes have been in operation in Colorado and Wyoming for many years. The Supreme Court of Colorado has thus expressed its opinion upon this subject in the case of *Ft. Lyon, etc., Co. v. Arkansas, etc., Co.*, 39 Colo. 332, 341 :

It was a new field and, in the light of experience, we can, perhaps, point out many imperfections in these statutes, but they have been upheld by the courts and acquiesced in by the people for more than a quarter of a century.

And in *Broad Run Inv. Co. v. Deuel, etc., Co.*, 47 Colo. 573, 579, it was said :

The general adjudication statutes have often been before this tribunal for consideration. They have been held to be a legitimate exercise by our legislative assembly of the police power of the state, and the proceeding thereby furnished is in the nature of a proceeding in *rem*.

The case of *Ormsby County v. Kearney*, 37 Nev. 314, 142 Pac. 803, has been cited by appellant (p. 51, appellant's Brief) and copiously quoted from. As we will show at another point, this case is squarely against appellant's contention, in so far as it is an authority in this case. Referring to the opinion of Mr. Justice Norcross in that case (at p. 805, 142 Pacific Reporter; 37 Nev. p. 336) we find the following statement:

It is manifest, both from the title and body of the act, that one of the main purposes of this law and doubtless the principal purpose, was to place the distribution of the waters of the stream or stream systems of the state, to the persons entitled thereto, under state control. * * * It is not seriously urged, if we understand counsel correctly, that the state, within its police power, may not so regulate the distribution of the waters of the state. It is a matter, we think, clearly within the lawful exercise of such power. The public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power, and other purposes. While the police power cannot be made an excuse for the enactment of unreasonable, unjust, or oppressive laws, it may be legitimately exercised for the purpose of preserving, conserving, and improving the public health, safety, morals, and general welfare.

At another part of the opinion (on page 806 of 142 Pacific Reporter), it is said (p. 338, 37 Nev.):

If it may be conceded that the relative rights of all water users upon a river system may be ascertained by some lawful method of procedure, then no constitutional right can be said to be infringed by a system of state control such as is provided in Sections 52 to 56, inclusive, for such system is designed to *protect all water users in their rights*. The courts of all the states that have adopted similar water laws have held the same to be within the lawful exercise of the police power of the state.

On page 341, it was said:

The provisions of the act in question do not violate the due process of law provisions of the State or Federal Constitution.

And it was said in the concurring opinion of Mr. Chief Justice Talbot (at p. 811, of 142 Pacific Reporter; 37 Nev., p. 355) :

As in these arid regions water is most essential for the support of agriculture, one of the greatest industries of the commonwealth, and by reason of its nature the regulation of its use and the limitation of appropriators to the amount to which they are entitled and need for beneficial purposes is of prime importance, no good reason is apparent why the people's representatives in the legislature assembled may not in behalf of the public welfare pass laws to regulate its use, as is done in other inter-mountain states and with other property and business pursuits.

Analogous to the subject under consideration is the principle applied in *Clark v. Nash*, 198 U. S. 361. Here, in an action to condemn a right-of-way through a private irrigation ditch, to enable plaintiff to conduct water to his farm for irrigation purposes, a statute under which the action was brought in the courts of Utah was upheld because in that state the reclamation of arid lands by irrigation, is so essential to the welfare of the state as to constitute the taking of property therefor, for a public use. This case is important in this connection only to illustrate the interest which the public has in the reclamation of its arid lands and the conservation and control of its natural resources. The court said in this case (p. 370) :

The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western States by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states, arising from mining and the cultivation of an otherwise valueless soil by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated.

The case of *Fallbrook Dist. v. Bradley*, 164 U. S. 112, 159, 160, is another instance of the recognition by this court of the same principle. In the case of *In Re Willow Creek*, 74 Ore. 592, heretofore referred to, the Supreme Court of Oregon passed upon the statutes here attacked and held them to be a valid exercise of the police power. At page 610, 74 Ore., it is said:

It is evident that in the enactment of the Water Code, the state being interested in providing for a system for the regulation of the use of the water and for the determination of existing rights thereby exercised the police power of the state in order to provide a complete system of state control, in the regulation of the diversion and use of the water, and a means for having a record made of the rights to the same for much the same purpose as records of title to real estate are provided.

And on page 617, it was said:

Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.

And at page 616, after remarking that the statutes in question expressly protected vested rights and that in the absence of such statutory provision, the legislature would have no power to impair vested rights, it is said:

The main purpose of the law is to protect water rights and to promote the utilization of the same.

And on page 613, the court said:

To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of

supply at a reasonable expense, the state enacted the law of 1909, thereby to a limited extent calling into requisition its police power.

Similar statutes have been upheld as a valid exercise of the police power in Nebraska, in the following cases:

Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121; 138 N. W. 179.

Crawford v. Hathaway, 67 Neb. 325; 93 N. W. 794.

Farmers' Canal v. Frank, 72 Neb. 136.

We have, therefore, the unanimous opinion of every court of last resort where this question has been raised, that the statutes in question are in general within the police powers of the State.

One of the principal objects to be attained by proceedings such as provided by these statutes is to remedy the confusion and uncertainty which exists relative to water titles and to give those titles greater stability and value by perfecting a complete record thereof to be kept in a public office. The whole proceeding is thus described in *In Re Willow Creek*, 74 Ore. 592, 613, as follows:

Unless the suit is first commenced in court and the cause referred to the Board under Section 6635, Lord's Oregon Laws, the proceedings before the Board are not initiated by the filing of a complaint or pleading setting up the rights claimed. A mere request is made by one or more water users upon a stream. The Board is required to make an investigation to ascertain whether or not the conditions justify the proceeding. In order to obtain injunctive relief or to exercise the right of eminent domain, resort must be had to the courts. In a proceeding before the Board, provision is made for an impartial examination and measurement of the water in a stream, of the ditches and canals, and of the land susceptible of irrigation, and for the gathering of of other essential data by the State Engineer, including the preparation of maps, all to be made a matter of record in the office of the State Engineer, as a foundation for such hearing and to facilitate the

proper understanding of the rights of the parties interested. Under the old procedure such information was often omitted. When measurements were made by the various parties to a suit they were nearly always made by different methods and were conflicting. The other evidence in regard thereto, being mere estimates, rendered a determination extremely difficult for the court and of questionable accuracy and value when made. To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the state enacted the law of 1909, thereby to a limited extent calling into requisition its police power. By proceeding in accordance with the statute, when the matter is presented to the court for judicial action, it is in an intelligible form. The Water Board and state may then be represented by counsel. Liberal provision is made for all interested parties to be notified and heard.

The state has long been recognized as having the right to legislate so as to remedy any confusion and uncertainty as to titles to land. So it was said in *American Land Co. v. Zeiss*, 219 U. S. 47, 60:

As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that the government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below. * * * That a state has the power, generally speaking, to provide for and protect individual rights to the soil within its confines and declare what shall form a cloud on title to such soil was recognized in *Clark v. Smith*, 13 Peters 195. So also it is conclusively established that when the public interests demand, the law may require even a party in actual possession and claiming a perfect title to appear before a properly constituted tribunal and establish that title by a judicial proceeding.

The case of *Hough v. Porter*, 51 Ore. 318, involved the waters of Silver Creek, a small stream in Oregon from which about twenty or thirty parties were diverting water. In April, 1900, Hough brought suit against Porter to restrain him from interference with plaintiff's use of the water. After the testimony had been taken, the trial court found it impracticable to settle and make a complete determination of the matters involved between plaintiff and defendant, without the presence of other parties, and directed that they be brought in and be required to interplead. The other claimants were thereupon brought in and made parties, and testimony was again taken, and a final decree rendered, which was appealed from to the Supreme Court, and in January, 1909, that court rendered its opinion. At page 370 thereof the court said:

The discretion of the court below in this respect was exercised by requiring all persons owning lands adjoining or claiming an interest in the waters of Silver Creek, its tributaries or branches, to be brought in and made parties, either plaintiff or defendant, as their interests appeared, with directions to interplead as to each other, and we think the evidence adduced at the trial confirms the wisdom of the course pursued. *It is consonant with public policy, and public interests require*, that when in the determination of conflicting claims to the right to the use of public streams, for irrigation, manufacturing or other useful purposes, it appears that many suits must eventually be brought to determine the various rights of persons whose property is to be affected by such use, it should be within the sound discretion of the trial court to require all, or any of the persons interested, to be made parties, as was done here, in order that the rights of each may be adjudicated and finally determined in one proceeding. This course should be permitted, and is obviously contemplated by the statute, not only with a view to economy in litigation, but that the respective interests of all affected may be justly, peaceably and permanently ascertained and settled during the lifetime of those cognizant of the facts upon which the adjudications must be had. It is obvious that it is not only impracticable to determine such rights in many instances without adopting such course, but that if left to separate suits to be brought from year to year as disputes may arise, not only will much valu-

able evidence pass beyond the reach of all, but such course, if pursued, must necessarily result in years of litigation and turmoil, and, in many instances, in a complete denial of justice. We are of the opinion, therefore, that no error was committed by the court in requiring the appearance of all the defendants.

In June, 1909, after more than nine years of litigation, the final decree of the Supreme Court was rendered. It is said on page 449 of 51 Oregon:

Under the fundamental law of our land all persons are entitled by due process of law to protection in their property rights, and to a speedy hearing of any controversy in respect thereto: *Constitution*, Ore., Art. I, Sec. 10. It is clearly manifest, therefore, that after this cause has dragged along through the courts for a decade, to remand it to the court below for another indefinite journey would not only be to disregard the letter and spirit of the section of the Bill of Rights cited, but, in effect, to declare it obsolete. And, in this connection, it should not be overlooked that, during the many years which have elapsed since the institution of this proceeding, some have been deprived of the use of water to which they were entitled, while others, and prominent among them this petitioner, have received much more than their legal quota, for which reason, if for no other, without discovering more than ordinary reasons therefor, we would not be justified in again delaying the final determination hereof.

Many other instances might be cited where litigation over water rights was prolonged for many years by reason of the inability of the ordinary processes and remedies of the common law to meet the exigencies of these cases. The subject is discussed in the case of *Ormsby County v. Kearney* (*Anderson v. Kearney*), 37 Nev. 314, 338; 142 Pac. 803, 806, where it was said:

It is the history of irrigation in this and other states that the first appropriators of waters upon the natural streams are frequently forced into long, vexations and expensive litigation to protect their rights against subsequent appropriators. The case of *Bliss v. Grayson & Anderson* in the state courts, involving water rights on the Humboldt River, and *Miller & Lux v. Rickey et al.*, in the federal court,

involving water rights on the Walker River, are conspicuous examples, showing the need of some kind of intelligent state intervention. The case of *Bliss v. Grayson*, begun in the district court of Humboldt County in July, 1889, reached the Supreme Court a decade later, with the result of a reversal and a new trial ordered. (*Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231.)

As the result of these decisions and in the light of the history of water right litigation in the Western States, which has served so materially to retard the development of the agricultural interests of that section in preceding years, we submit that these statutes are a proper exercise of the police powers of a sovereign state.

While counsel for appellant assert that the State has no ownership in the waters of natural streams, it has been often declared, in constitutional provisions and by legislative declaration, in the Western States, that water belongs to the public or to the state. The Legislature has so declared in this State, by a statute heretofore quoted. We need not, however, enter into the discussion of the ownership of water in running streams, a subject which, after all, is scholastic, rather than of practical importance. The courts, especially in the Western States, have often used the expression "public waters" to indicate the public interest in natural streams. But whether, as under the common law, water in running streams is considered as the property of no one, or *publici juris*, or the property of the state or public, yet such waters, constituting one of the great natural resources of a state, are beyond question the subject of a valid exercise by the state, of its police powers. We need not, therefore, even consider the ownership of the water itself, for, if it be deemed private property purely, while still in the natural stream (and this has never been the case anywhere, under any system of jurisprudence), still would it be subject to that control over it which the state may assume over private property, within its territory. Therefore, to deny simply that the state has any property interest in such waters, is not sufficient. The interest the state has, whether as a proprietor, or as a sovereign, is for the advancement of the public welfare,

and, as we have shown, we think, is founded upon well recognized grounds of public policy.

The primary purpose of these proceedings being to secure the orderly and equitable division of the waters of the natural streams among those entitled thereto, we have, we think, in these statutes, an exercise of the police power of the highest order. The distribution of water among claimants, the aim of modern irrigation legislation, can be successfully accomplished only after a determination of the relative rights of the various claimants to these waters. This has been recognized in nearly all the Western States, as we have shown. It is well said in *Hamp v. State*, 19 Wyo. 377; 118 Pac. 653:

By such supervision no rights of private property are invaded, but under the police power of the state, in the interest of the public welfare, and for the protection of private as well as public rights, property intended to be used for another purpose than that of diverting public water is regulated, and it is a mistaken notion that through such regulation private property is taken for either public or private use, within the meaning of the constitutional provision prohibiting such taking without just compensation.

The necessity for some method of police control to divide the water of a stream, among those entitled, under a decree, to the use thereof, was recognized in *Montezuma Canal v. Smithville Canal Co.*, 218 U. S. 371, to which reference has already been made. In that case it was held that, in the absence of legislative action on the subject, the court was authorized to appoint a water commissioner to take charge of a stream system and enforce the decree, and reference (with approval) was made to the police regulations of Wyoming.

In order to more effectually enforce the decree, the court in *Hough v. Porter*, 51 Ore. 318, 444, provided for a system of distribution under the decree, as follows:

But, owing to the difficulties likely to arise in the enforcement of a decree involving such questions as usually develop in a suit of this class, the court below should, in order to protect the rights of all the parties, or their successors in interest, enter such

supplemental decree or decrees as may be necessary for that purpose; and, if at any time deemed necessary by it, the court should require the sheriff, or other officer or person as it may designate for the purpose, including an engineer or other assistant, as may be required, to fix at the points of diversion or other proper places suitable boxes or headgates, with a view to being able, in accordance with the decree, properly to measure, regulate, and distribute the water between those who, under the decree, may be entitled to the use thereof, the costs for which should be taxed against each in such proportion as the court may deem just and equitable.

And in the opinion on rehearing, written shortly after the passage of the Water Code, the court, referring to that act, said (p. 453):

For example, it might become necessary from time to time to gather information concerning the acreage irrigated, as to what tracts require water, quantity necessary for the proper irrigation thereof, the best and most effective method of distribution, quantity of water available, amount actually applied, etc. (see 51 Ore. 380, 444; 95 Pac. 751; 98 Pac. 1101, 1111), all of which may be done by and under the direction of the trial court, as in other cases, or in the manner recently provided for by legislative enactment. See General Laws of 1909, p. 319, Chap. 215, Sec. 36, *et seq.* Evidence for such purposes, owing to its nature, will always be available, and accordingly is not subject to the objection hereinbefore alluded to in response to petitioner's demands. It is obvious, therefore, that the emergency advanced for reopening the cause at this time, for the purpose of securing the class of evidence suggested as desirable, is fully recognized in our former opinion and provision will be made therefor in the decree to be entered here, making such proceeding at this time clearly unnecessary.

In *McLean v. Farmer's High Line, etc., Co.*, 44 Colo. 184, 98 Pac. 16, it was said:

The laws of the state providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters and to prevent breaches of the peace

which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them.

And Mr. Kinney says (*Irrigation and Water Rights*, Sec. 1341, p. 2430, Vol. 3, 2d ed.) :

And, in general, it may be said that the right of the legislature of the states to regulate the use and prohibit the destruction of property extends, not only to that class of property over which the state, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

And the same writer, at another point (p. 2842, Sec. 1568), says:

In general, these acts furnish an elaborate system of special procedure for the settlement and adjudication of all questions of priority of the appropriation of water from a common source of supply, as between the respective claimants thereto, and by decree awarding to each claimant the quantity of water to which he is entitled for the beneficial use or purpose to which he applies it. The power to enact such laws comes within the police power of the state, as one feature of the law of state control, which is the right of each state to adopt such laws regulating and controlling the waters which flow within its boundaries as it sees fit. As well stated in an early Colorado case: "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, and to this end they provide a system of procedure for determining the priority of rights as between the carriers." Where such statutes have been adopted by the legislature of a state, they will be followed by the federal courts.

The subject of the Wyoming system is discussed to a considerable extent by Mr. Elwood Mead in his widely-read book, *Irrigation Institutions*. At p. 274 he refers to

the statement of another well-known writer on the practical questions of irrigation. He says, quoting this writer:

In some of its details the Wyoming irrigation code needs modification, to adapt it to changing conditions, and because it was in the first place a compromise between the advanced views of reformers and the conservatism of those who wished to pattern after the older irrigation states. On the whole, however, the system justifies the commendation bestowed upon it by William E. Smythe in "The Conquest of Arid America": "These laws and this administrative system have not only given peace and prosperity to the irrigation industry of Wyoming * * *. Other states have copied them extensively, and there can be no question that in the end they will become common to the entire arid region. Idaho, Nebraska, South Dakota, Kansas, and Washington have enacted portions of the Wyoming laws. In all the other states, with the single exception of California, the example of Wyoming has produced results, and there is hope that even California will learn in time that irrigation and litigation are not necessarily synonymous terms."

And in the preface to the work (p. 6), Mr. Mead remarks:

The lesson of these years is that the vital agricultural problem of the arid west is to establish just and stable titles to water and provide for their efficient protection in times of need. Every farmer in this region comes to understand the overshadowing importance of water. Their farms extend along many rivers for scores and even hundreds of miles. Every irrigator from a stream is bound to his fellow-irrigators by their common tie of dependence upon it. The amount diverted by one ditch is a matter of concern to all other ditches below, because it affects the volume remaining for their use. The independent life of the farmer in humid lands is impossible. Irrigated agriculture is an organized industry, and the prosperity and happiness of those engaged in it are largely determined by the character of its institutions.

And on p. 80, the same writer says:

The filing of these claims does not give complete title to water. In all of the states, except Wyoming, Nebraska, and Nevada, this has to be established by

litigation in the courts. Sometimes these lawsuits take the form of injunctions, sometimes equitable actions to determine the respective rights of appropriators or to quiet their titles. But whatever their form, they all have one thing in common: they are waged as though the issue were purely a private matter, and the disposal of the rains and snows that make streams were something in which the public had no concern. There is no disinterested or public measurement of the ditches and streams or of the lands irrigated. The testimony submitted is often inaccurate and contradictory, but it is all the judge has on which to base his decree. Even the government, as the owner of large areas of land requiring irrigation, is never a party to these suits, nor is the state, although nothing so vitally concerns the public welfare as the establishment of ownership or control over streams.

And at p. 82, it is said:

As the demands upon the water supply have grown, necessity has led to a gradual decrease in the freedom of the appropriator and an increase in the control exercised by the public authorities. This change has been so gradual that the legislatures of Wyoming and Nebraska have in effect abandoned the doctrine of appropriation, although retaining the word in their statutes. The person wishing to use water must secure a permit from a board of state officials, and the right acquired is not governed by the appropriator's claim, but by the license for the diversion issued by the state authorities. This tendency toward public supervision is manifest in the other arid states, and it seems only a question of time when the doctrine of appropriation will give way to complete public supervision.

And on p. 369, it is said:

There is the same need for public control over streams that there is for government control over public land. There is the same need for the state engineer's office in every arid state to direct the diversion of streams that there is for land offices to supervise filings on public lands. We cannot go on in the future as we have in the past, leaving water to be filed upon without limit, used without definite regulation, and leaving titles to its future ownership to be settled in the courts by ordinary suits at law.

The courts have also spoken with reference to the necessity for conserving the water supply. In *Whited v. Cavin*, 55 Ore. 98, 107, Mr. Justice King said:

It is so well settled as almost to become axiomatic that beneficial use and the needs of the appropriators, and not the capacity of the ditches, or quantity first run through them, is the measure and limit of the right of the appropriators.

And in *Carson v. Gentner*, 33 Ore. 512, 515, at was said:

The doctrine of the common law, that the water of a stream must continue to flow in its natural channel undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule, founded upon the necessities under which the early settlers labored, has been inaugurated.

And in *Donnelly v. Cuhna*, 61 Ore. 72, 76, the court said:

The defendant's attorney, involving the rule adopted in *Coventon v. Seufert*, 23 Ore. 548 (32 Pac. 508), that the capacity of the ditch at the smallest place affords the measure of the right, insists that the quantity of water awarded by the decree was a just distribution. The principle announced in the case referred to is not now controlling, when more careful methods of irrigation have been discovered, so that water is not wasted, and a larger area of land is adequately moistened, thereby promoting a greater and better development of the country.

And in *Turner v. Cole*, 31 Ore. 154, 159, it is said:

The extent of the appropriation must be determined by the quantity of water used, and the time of its use, as it is the policy of the law that none shall be permitted to go to waste when it can be appropriated for a beneficial purpose elsewhere.

And in *Caviness v. La Grande Irrigation Co.*, 60 Ore. 410, 431, it was said:

Extravagant or wasteful application even to a useful project or any employment of water in a non-beneficial enterprise is not included in the term use as contemplated by the law of waters. Then, too, when even an appropriator is not using the water it is available for the use of others.

In *Andrews v. Donnelly*, 59 Ore. 138, 147, it was said:

Before the country was so thickly settled as it is now, the practice for the appropriator of water "to keep all you get and get all you can" was in many cases tolerated; but, yielding to reason and justice to all, the later authorities have established a different rule.

And in *Hough v. Porter*, 51 Ore. 318, 419, 420, Mr. Justice King says:

But will it do to say, that because in some cases irrigation was had by damming the sloughs, with but little expense and work, causing the large excess of water supply to spread over the premises, the old methods, which had their origin when there was but little demand for water, and its supply correspondingly abundant, may be continued? in this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available: *Van Camp v. Emery*, 13 Idaho 202 (89 Pac. 752); *Anderson v. Bassman* (C. C.), 140 Fed. 14, 27. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby.

In *In Re Willow Creek*, 74 Ore. 592, 622, Mr. Justice Bean says:

The methods relied upon by the Eastern Oregon Land Company in the use of water, as well as similar use made by other irrigators in former years, is wasteful. It is often permitted as a privilege and not as a right, while it can be exercised without injury to anyone: *Hough v. Porter*, 51 Ore. 318 (95 Pac. 732; 98 Pac. 1083; 102 Pac. 728). The laws of the state and public policy alike demand that all waters available for irrigation purposes must be conserved and used in a manner that will permit of the highest development of the agricultural and other resources of the state. The best methods for the application of water to the land should be used. No person should be allowed more water than is necessary when applied by a proper system; this, in order that a larger area may be made productive by the

extended application of such water. All the rights adjudicated in these proceedings are subject to this rule.

In *Little Walla Walla Irr. Co. v. Finis Co.*, 62 Ore. 348, 351, it was said by Mr. Justice Eakin:

It is the policy of the law that the best methods should be used and no person allowed more water than is necessary, when properly applied, and thus a larger acreage may be made productive by its extended application.

In *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 91, Mr. Justice Wolverton said:

In *Simmons v. Winters*, 21 Ore. 35 (28 Am. St. Rep. 727; 27 Pac. 7), Mr. Justice Lord says, "the amount of water appropriated must be restricted to the quantity needed for the purpose." The reason of the rule is that by nature the water supply is limited in the arid regions, and habitation is dependent upon its use to make the earth yield up its precious metals and the soil to bring forth its fruits in season, hence the restriction of its use to quantities needed for beneficial purposes, as with such husbanding of the supply there is yet not sufficient to meet the increasing demands.

And at p. 96 it is said:

The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the development and advancement of beneficial industries.

These cases show clearly the expressed judicial policy of the courts of the State in protecting the water resources of the State. The legislation here involved is simply a continuation of that policy which the courts first adopted.

In every instance, the courts of the Western States have held that proceedings of the character here involved are administrative, and not judicial, although certain quasi judicial functions are involved. The court in *Farm Investment Co. v. Carpenter*, *supra*, said:

The determination required to be made by the board of control is in our opinion primarily admin-

istrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which for the state in its sovereign capacity represents the public, and is charged with the duty of conserving public as well as private interests. This board, it is true, acts judicially, but the power exercised is *quasi* judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards. The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of public lands.

The same opinion is held with reference to the Board of Irrigation, in Nebraska, in the case of *Crawford v. Hathaway*, 67 Neb. 325; 93 N. W. 781, where it was said:

The Wyoming constitution has not provided for a board of irrigation with judicial functions in the sense that it is a judicial tribunal. The duties of the board there, as here, are supervisory and administrative in character, and not judicial. While it may be true that they are given powers of a *quasi* judicial character, this of itself does not constitute them a judicial body.

In the case of *Enterprise Irrigation Dist. v. Tri-State Land Co.*, 92 Neb. 121, 142; 138 N. W. 171, 178, the Supreme Court of Nebraska again expressed a similar opinion in the following language:

In the face of these decisions, it hardly seems necessary to again consider the question, but we have done so and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States, and of the several states, boards of individuals for the purpose of exercising executive or administrative functions are often compelled to inquire into and determine questions requiring the exercise of powers judicial in their nature. Some of such determinations are often by virtue of the statute defining the functions and powers of the tribunal, final and decisive, and others are made reviewable by appeal to the courts. * * * Whether reviewable by the courts or not, the exercise of such powers by

tribunals of this nature has seldom been held to be a violation of the constitution in this respect.
 * * * We are satisfied with the conclusions reached by this court in the cases cited, which were followed in *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286, and see no reason to change our conclusions in this respect.

Appellant attempts to find an analogy between the findings of the State Water Board, under the Oregon statute and the award of a commission appointed by a justice of the peace, under a Montana statute (see p. 91 of appellant's Brief), construed in the case of *Thorp v. Woolman*, 1 Mont. 168. The power of the commission created in the Montana case would correspond to some extent to the powers of a Water Master, under the Oregon statute. The principal constitutional objection urged in this case, however, was that judicial power had been conferred upon a tribunal not authorized by the State Constitution. We are not considering here the constitution of a state, but of the United States. Whatever a Montana court may have decided with reference to its constitution is not a precedent for an interpretation of the Constitution of Oregon. But under the Oregon Constitution, judicial power may be conferred upon any court or tribunal the Legislature sees fit to create, while the Montana constitution specifically limits the judicial power to certain designated courts.

We think, however, that the question whether the Water Board is exercising judicial functions in contravention of the provisions of the State Constitution is one for the decision of the Supreme Court of the State, and that no provision of the Federal Constitution prohibits a state legislature from creating a tribunal, with commingled administrative and judicial functions. *Dreyer v. Illinois*, 187 U. S. 83, 84.

In view of the practically unanimous opinion of the courts of the Western States that the state may assume control over natural sources of water supply, we think the following statement from the case of *Clark v. Nash*, 198 U. S. 368, is applicable:

The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an indi-

vidual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state, which in all probability would flow from a denial of its validity.

(B) The proceeding here questioned being one well within the police powers of the State, it does not constitute a taking of property in any sense, and the question of compensation for property taken for a public use does not enter into the case.

We think there can be no dispute upon this point. Counsel for appellant has attempted to inject into the case the theory that here is a taking of property without compensation, because by a system of State control and regulation some interference may be occasioned to its rights. We may say, in advance, that we have no quarrel with the proposition submitted by appellant that a water right is a vested property right. We will concede his statement (p. 40, appellant's Brief), that a water right is a vested right, which cannot be taken away, except for a public use, and then only upon compensation paid through due process of law. A statute which would attempt to vest any person's property in another, by mere legislative fiat, would be of no effect. But in the application of this well-understood constitutional protection, we must consider the nature of the case we have before us. Eminent domain, for instance, proceeds only with actual compensation. Taxation proceeds upon the theory of a benefit, either special or to the general public, for property taken.

But the police power is different in its operation. It proceeds upon the theory that property rights must be so exercised as to permit an equal enjoyment in others of *their* rights of property, under the maxim "*sic utere tuo ut alienum non laedas.*" Where the State in the exercise of its police powers regulates or assumes control over property, such interference as may be occasioned thereby does not in any sense constitute an appropriation of private property

to a public use, and no compensation whatever is necessary or essential. The restraint which may be placed upon the exercise of a right of property, to protect the equal or like rights of other property owners is merely a lawful regulation for the public benefit, including, as well, the owner of the property as others.

In *Barbier v. Connolly*, 113 U. S. 27, 31, referring to the police power of a state and the Fourteenth Amendment, the court said:

But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

The case of *Chicago, etc., R'd. v. Chicago*, 166 U. S. 226, cited at p. 41 of appellant's Brief, involved the final judgment of the Supreme Court of Illinois, rendered in condemnation proceedings, to take property for a public use. The court held very clearly (p. 252) that title to property is subject to the police powers of the state, and that it was not a condition of the exercise of the authority that the state should indemnify the owners of the property from damage or injury resulting from its exercise. Nor was the damage or injury thus occasioned a taking for a public use, nor deprivation of property without due process of law.

It was said in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111:

In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use, * * * and in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

The California cases cited by appellant (*San Diego, etc., Co. v. Neale*, 88 Cal. 50; *San Francisco v. Collins*, 98 Cal. 259) were condemnation cases, in which the assessment of costs to the owner of the property condemned was held to deprive him of just compensation. We are not called upon to dispute the correctness of the opinion in either case, since neither is applicable here. Costs may be constitutionally assessed and allowed in all ordinary proceedings, but where property is condemned the owner cannot be deprived of just compensation by the assessment against him of the costs of the proceeding. We have, we believe, disposed of the contention that the proceedings deprive appellant of its property without compensation. The proceedings in question, of course, do not affect that result more than any other suit or action. Appellant may be required at any time to answer in a suit or action involving its property rights, and the costs and expenses incident thereto, which are largely regulated by its own conduct, do not prevent the institution of the suit or action. There is no taking of property, in these cases, in any constitutional sense, although it may be compelled to expend its money to protect its title. The proceedings in question here are not for the purpose of divesting the appellant of its title to the water and vesting such title in another. The purpose, as explained in *In Re Willow Creek, supra*, is clearly to protect vested rights, and a proper reading of the statutes could lead to no other conclusion.

(C) The essential elements of due process are, first, notice, and, second, opportunity to be heard.

With this statement of the essential elements of due process in mind, we contend that the preliminary proceedings before the State Water Board afford ample notice and opportunity to be heard. We do not understand, however, that it is appellant's contention that the notice provided for by the statutes in question is insufficient or improper, or that the statutes deny a hearing, or prevent it from setting up its rights before the Board. These questions are not discussed in appellant's Brief. The point made by appellant is that there must be a court or judicial body before it can constitutionally be required to submit to jurisdiction. In support of this contention he cites but

three cases, none of which is particularly applicable. We might concede the point contended for, and rely upon the assurance which the statutes attacked give that every claimant in these proceedings shall have his day in court, and in a court which has existed since the birth of the State, the jurisdiction and judicial power of which appellant does not question. We are disposed, however, to question any assertion that a court of justice is an essential element of due process of law, or, in other words, that appellant may not be required to appear and submit to the jurisdiction of an administrative board, duly authorized by statute to determine a legal question. Referring to *Davidson v. Board, etc., of New Orleans*, 96 U. S. 97, 102, we find a careful consideration of the essential elements of due process of law, and the following concise statement of those elements:

A most exhaustive judicial inquiry into the meaning of the words "due process of law" as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.

And in *Public Clearing House v. Coyne*, 194 U. S. 497, 508, it is said:

That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations.

And as was said in *Ballard v. Hunter*, 204 U. S. 241, 255 (27 Sup. Ct. Rep. 261, 266):

A precise definition has never been attempted. It does not always mean proceedings in court. *Murray v. Hoboken Land & Imp. Co.*, 18 How. 272; *McMillen v. Anderson*, 95 U. S. 37. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case.

Mr. Justice Bradley in a concurring opinion, in *Davidson v. New Orleans*, 96 U. S. 97, 107, 108 (quoted with approval in *Ballard v. Hunter, supra*) said:

That in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment, or for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require.

We have no dispute with the contention that there must be a tribunal having jurisdiction to decide the matter in issue. Such a tribunal is provided for by the statutes, in the circuit court of the State, and, as held in *in re Willow Creek, supra*, the judicial determination is made after the circuit court acquires jurisdiction. But that there can be no determination of a legal question before an administrative board is a theory which has long been exploded, not only in the courts of the several states, but as well in this court. The whole matter is thus summed up in the case of *Sheldon v. Hayne*, 261 Ill. 222, 225:

Due process of law does not necessarily mean judicial proceedings. Orderly proceedings under established rules not violating fundamental rights must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process. * * * The purpose of this constitutional requirement is to protect every person in his personal and property rights against the arbitrary action of any person or authority.

The functions committed to administrative officers by the laws of a state or of the United States often involve decisions of questions of fact and of law which concern the private rights of individuals and which might, had the leg-

islature so provided, have been the subject of judicial investigations in courts of law, and whether the authority exercised be judicial or administrative, the necessity for due process of law is as apparent in either case. The decision of an administrative officer or board may be final and conclusive, or it may be made subject to review by the courts, in the discretion of the legislature, but if notice and an opportunity to be heard is afforded, the requirements of the Fourteenth Amendment are not violated. This proposition has been considered before by this court, and in the case of *Reetz v. Michigan*, 188 U. S. 505, there was before the court a statute of the State of Michigan providing for a State Board of Registration for physicians and surgeons, for the examination of all persons practicing medicine, and penalties for engaging in the practice of medicine without a certificate from the State Board. It was said, in construing the act (p. 507) :

It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant "had been legally registered under act No. 167 of 1883." That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the state supreme court is conclusive that the act does not conflict with the state constitution, and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. *Due process is not necessarily judicial process.* 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 97; *Ex Parte Wall*, 107 U. S. 265; *Dreyer v. Illinois*, 187 U. S. 71, 83.

There is nothing in the Federal Constitution which prevents a state legislature from delegating *quasi* judicial functions to administrative officers, nor, in fact, which prevents the delegation of purely judicial powers, should the legisla-

ture see fit to do so. Whether the commingling of powers ordinarily maintained in the states in separate departments would infringe the constitutional guarantee of a republican form of government, is, of course, a political question, of no interest in this case. This matter is disposed of by this court in the case of *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, where it was said:

A local statute investing a collection of persons not of the judicial department with powers that are judicial and authorizing them to exercise the pardon-power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty.

* * * The objection that the act of 1899 confers upon executive or ministerial officers power of a judicial nature does not, in our judgment, present any question under the due process clause of the Fourteenth Amendment.

The Supreme Court of Oregon, in the case *In Re Willow Creek*, 74 Ore. 592, in passing upon this feature of the case, said (p. 610):

The statute prescribing the duties to be performed by the Water Board and its members in their respective official capacities in a determination of water rights does not confer judicial powers or duties upon the Board or such officers in any sense as indicated by the constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the Board is not authorized to make determinations which are final in character. The findings and orders are *prima*

facie, final and binding until changed in some proper proceeding. The findings of the Board are advisory rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject matter and of the parties interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made. It might be said that the duties of the Water Board are *quasi* judicial in character. Such duties may be devolved by law on boards whose principal duties are administrative.

We cannot leave this branch of the case without referring to the numerous decisions of the state courts of the several states, which consider the meaning of the term "judicial power," as applied to boards and commissioners which are now commonly exercising powers to determine legal questions, as well as questions of fact, in every industry. Prominent among these may be enumerated railroad commissions, public utility commissions, and industrial accident commissions.

The whole matter is summed up by the district court in this case, where it said (217 Fed. 95, 98):

Laws governing the regulation and distribution of water and providing for the determination of the rights of the respective claimants thereto, similar in many respects to the Oregon statute, are in force in several of the arid states and as far as we are advised, the universal holding of the courts where the question has been judicially determined is that the Water Board or officer charged with the duty of executing such laws is an administrative body or officer clothed with certain *quasi* judicial powers necessary to enable it or him to discharge such administrative duties, and the proceedings before the Board or officer are not judicial and do not deprive the claimant of his property or water right without due process of law, since provision is made for resort to the courts by a dissatisfied claimant. The question is ably and satisfactorily discussed in *Farm Inv. Co. v. Carpenter* (61 Pac. 258), *Crawford Co. v. Hathaway* (N. W. 93, N. W. 781), *McCook Ingales Co. v. Cross* (102 N. W. 249), and *Ormsby v. Kearney*, recently decided by the Supreme Court of Nevada, and it would be mere reiteration to attempt to add anything to what has already been said on the subject in the opinion on the motion to remand.

In the case of *In Re Silvies River*, 199 Fed. 495, 501, the following statement of the nature of the proceeding is made:

Now the preliminary proceedings before the State Board of Control, in taking testimony and making findings of fact concerning the rights of the various claimants to the waters of a given stream are, in my judgment, not judicial but rather administrative. The powers of the Board are not brought into action by the filing of a paper in the nature of a complaint setting up asserted rights, but by the mere presentation to it of a petition or request by one or more users of the water without any allegations of issuable facts, other than that the petitioner is a water user on the stream and a request for the determination of the relative rights of the various claimant to such waters. No affirmative relief is asked and no adverse pleadings are required or permitted, or issues joined until after the evidence taken by the Board is open to the inspection of the various claimants and owners. After the filing of the petition, the proceedings are to be conducted by the Board and upon its initiative. Neither the petitioner nor the claimants obtain any redress for an injury as the result of such proceedings, but merely evidence of their title or right to the use of the water. It is true the Board is vested with power to issue notice to the various claimants requiring them to present their claims, to take testimony and make findings of fact, but these findings must be confirmed by the court. The Board has no power to make an adjudication of the rights of the claimants. Its duty is to ascertain the facts and present them to the court for its consideration. After the evidence and determination of the Board has been filed with the court, the proceeding probably becomes a suit or action, but until the Board has completed its examination, made its determination and filed its report, the proceedings are purely administrative.

The Supreme Court of Wyoming reached the following conclusion in the case of *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 134:

The position maintained by counsel is that a determination of the priorities of the rights to the use of water, involves solely a judicial inquiry into rights of property as between private parties; and

that the jurisdiction to undertake such an investigation and adjudicate therein can be constitutionally lodged only in some court which is by Article V of the Constitution, vested with judicial powers. The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the constitution to redress grievances and afford relief at law or in equity, under the ordinary and well-known rules of procedure. A purely statutory proceeding is created to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the Board; a proceeding which is to result not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceedings is a settlement or adjustment of the priorities of appropriation of the public waters of the State, and is followed by the issuance of a certificate to each appropriator showing his relative standing among other claimants, and the amount of water to which he is found to be entitled.

(D) The appellant may be required to appear in these proceedings before the State Water Board and submit its claim, and should it refuse to do so, within the time required by statute and in the manner therein provided, the decree of the circuit court will be final and conclusive, to the same extent as in any other suit or action in which a party is in default.

Appellant practically admits that such result may flow from a failure to appear before the Board, but it seems to be the principal point of its contention that it cannot be lawfully compelled to appear before an administrative board. This, we contend, is a matter arising under the State Constitution, and has been decided adversely to such contention in two cases in the Supreme Court of the State. One of these cases (*In Re Willow Creek, supra*) we have referred to. The other case (cited by appellant in his Brief) is the case of *Pacific Live Stock Co. v. Cochran*, 73 Ore. 417.

To some extent the point here made involves a consideration of the nature of the duties of the State Water Board in adjudication proceedings. It has been held that the duties of the State Water Board resemble those of a referee in a suit of equity under the practice prevailing in Oregon. Thus in *In Re Willow Creek*, 74 Ore. 592, 610, it is said of the Board:

Their findings and orders are *prima facie* final and binding until changed in some proper proceeding. The findings of the Board are advisory rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made.

With this language we compare the statement made by the federal district judge in the case of *In Re Silvies River*, 199 Fed. 495, 502, which was:

The Board has no power to make an adjudication of the rights of the claimants. Its duty is to ascertain the facts and present them to the court for its consideration. After the evidence and determination of the Board has been filed with the court, the proceeding probably becomes a suit or action, but until the Board has completed its examination, made its determination and filed its report, the proceedings are purely administrative.

We do not doubt the power of the legislature of a state (if conformable to the State Constitution) to enact a law which will make the decision of a state board of a legal question final and conclusive, where provision is made for an appeal to a regularly constituted court. This point is discussed in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, in determining the validity of the statute of that state upon the same subject, which made the determination of the state board final if not appealed from. The statute of Oregon under consideration differs in this respect from that of Wyoming, in that the Oregon statute does not provide for a final determination by the Board, but only findings of fact and an order of determination which is advisory only and which the State Board is required to file in the circuit court for review and judicial proceedings resulting in a final and binding decree. In this respect the Board has no discretion, the statute requiring that this be done "as soon as practicable" after making its findings (Sec. 24, on page 12 of appellant's Brief).

At this point we purpose to discuss the case of *Anderson v. Kearney*, 37 Nev. 314, 142 Pac. 803, quoted from so

abundantly by appellant's counsel, commencing on page 51 of its Brief. We have had occasion to quote from this case at another place in this Brief. It was clearly held in that case that the Nevada statute was constitutional and valid and would be given effect, but due to the peculiar wording of the Nevada Constitution no provision could be constitutionally made for an appeal from an administrative officer or board, and hence provisions of the statute giving the right of appeal from the decision of the State Engineer were ineffective, and it necessarily followed that there could be no review by the courts of the State. So far as the Federal Constitution was concerned the act was upheld. The Constitution of Nevada provides that the district court shall have "final appellate jurisdiction in cases arising in justices' courts and such other inferior tribunals as may be established by law." The constitution further limits the judicial powers of the State to certain enumerated courts. Mr. Justice Talbot (p. 812, 142 Pac. Rep., 37 Nev. 314, 356) said:

As the constitution limits the judicial power in this state to the supreme, district, justice, city, and municipal courts, it follows that it does not provide for an appeal to the district court from the decision of any tribunal not mentioned in that document.

The opinion of Mr. Justice Norcross (which was the prevailing opinion) refused to consider whether the provisions for appeal were valid, or whether the determinations made by the State Engineer had any effect as a final determination, but dismissed the contention made in that respect with the following statement (37 Nev., p. 351):

In so far as the law authorizes the State Engineer to investigate and determine the relative rights of water appropriators or users upon any stream or stream system, or requires statements to be made by the several claimants of their respective claims, and requires such claimants to support the same with proofs and authorizes the State Engineer or other executive officers to control the distribution of the waters of a stream to the persons found to be entitled thereto, the law is valid.

Mr. Chief Justice Talbot states in his opinion (p. 811, 142, Pac. Rep., 37 Nev. p. 355):

To this end the State Engineer may proceed in the manner directed by the statute to obtain the best evidence to be had, whether judgment, documentary or oral, and to carefully and accurately determine the relative rights of water users.

Both opinions obviously recognize the authority of an administrative officer to make a determination and to enforce such determination, and to take charge of a stream system without judicial determination or without provision for appeal to or review by the courts of the State.

Inasmuch as one of appellant's chief contentions is that the State Water Board cannot lawfully be authorized to take charge of the distribution of the water after the determination of the Board and pending the action of the circuit court as provided in Sections 24 and 28 (pp. 12 and 14 of appellant's Brief, italicized), this case is particularly interesting as it disposes entirely of appellant's case in this respect.

The opinion of Mr. Justice McCarran, dissenting, is of particular interest. He carefully distinguishes the Constitutions of Wyoming and Nebraska (p. 819, 142 Pacific Reporter) and holds that no appeals can be constitutionally provided for from the decision of the State Engineer "and the district court would be without power to assume such jurisdiction." He says (37 Nev., p. 379) :

If we view the contemplated final orders or decrees of the State Engineer and his determinations in the light of the conclusions, it unanswerably follows, that, there being no appeal from the determinations of the State Engineer, they are therefore final determinations and these final determinations are in matters in which the right of possession to property is involved, and the party aggrieved is cut off from access to the civil courts, and the constitutional guarantee is nullified. (142 Pac., p. 819.)

And at page 821, 142 Pacific Reporter (37 Nev., p. 384), the opinion continues :

It follows that the acts of the engineer, even if intended to be ministerial, become final because of constitutional provisions as to the jurisdiction of courts prohibiting review by the process suggested by the act.

And, again, on page 385, 37 Nevada, the opinion continues:

By reason of the peculiarity of our constitution, the avenue suggested by the statute as one of redress affords no relief, because the courts cannot take jurisdiction by the way suggested. Hence the acts of the engineer become final. The courts are ousted of jurisdiction.

Other extracts might be made from the same opinion, but the foregoing clearly shows that the learned justice based his opinion upon the constitutional inhibition which prevented a review by the courts of the decision of the State Engineer.

The same justice, at pages 822 and 823, 142 Pacific Reporter, thus distinguishes the Oregon and Nevada statutes (37 Nev., p. 389):

But it must be observed that a similar policy sought to be carried out in the States of Oregon, Colorado, and Utah and Washington, and in each of those states the jurisdiction, for primary adjudication, is vested in the courts. * * * While many of the provisions of the water law of 1913 may have been adopted from the statutes of Wyoming, it is manifest that many of the provisions were taken from and are more nearly like the statutes of Oregon, *but in the latter state the court is looked to for adjudication.* * * * Under the codes of the states heretofore referred to, the uniform laws of procedure are resorted to, and judgments and decrees are entered after the claimant has been afforded opportunity to avail himself of all that due process of law guarantees.

Here we have a construction of a statute of our State which is diametrically opposed to the contention of the appellant, which offers the opinion as an authority in its own behalf.

In the opinion of Justices Norcross and Talbot, the State Engineer was authorized to take charge of streams and distribute the water in accordance with his determination, but as the determination of the engineer was for administrative purposes only, and did not have the effect of a decree of a court, and there was no constitutional method for reviewing the decision in the courts, the State Engineer should be

restrained "from making determinations which would in any way impair vested rights" (p. 811, 142 Pac. Rep.), and this was embodied in the decree which is printed in full on page 56 of appellant's Brief. We might say, at this point, that the decree is not full of meaning in respect to what the impairing of a vested right by the act of the State Engineer would consist of, and we suggest that it must have left that official much in the dark as to the extent he might go in distributing water in accordance with his determinations. Again we might say that even a court itself could not constitutionally "impair vested rights" in making a determination. The opinion of Mr. Justice Norcross, however, which is the opinion of the court, defines to some extent this provision of the decree (page 810, 142 Pacific Reporter), in substance saying that the State Engineer will be presumed to determine rights in accordance with the facts, and that rights which are supported by the evidence filed with the engineer are to be recognized accordingly, and, finally, it is said (37 Nev., p. 353) :

It is not an unlawful interference with the vested rights of water appropriators to so control these rights that each may have what belongs to him, but that he may not voluntarily, whether through a mistaken conception of his rights or not, interfere with the rights of others.

This case affirms these important principles, which are *contra* to the contentions of appellant: *First*, the statute afforded due process of law, and did not violate the provisions of the Fourteenth Amendment or other Federal constitutional inhibitions. *Second*, that an administrative officer, without the adjudication of the rights thereto by a judicial body or court of the State, may take charge of the distribution of the waters of a stream after a purely administrative determination, and distribute the waters thereof in accordance with such administrative determination, without impairing vested rights. *Third*, the opinion of none of the three justices denies the principle that a preliminary proceeding before an administrative board may become a judicial proceeding if brought before a court for judicial determination, and that the decree of the court would in such case become final, conclusive and binding.

Considering next the case of *Knox v. Kearney*, 37 Nev. 393, 142 Pacific 526 (cited on page 49 of appellant's Brief), we find the following to be the facts:

An action was brought to enjoin the State Engineer of Nevada and a Water Master from regulating the headgates of the plaintiffs. Plaintiffs, in their bill of complaint, set up a vested right to the use of the waters of Muddy River and interference therewith by the defendant officials. The following statement appears on page 528, 142 Pacific, referring to the bill of complaint (37 Nev., p. 397):

It is not alleged in the complaint that any water district has been created by the State Engineer under the act of 1913, or any other act; nor is it alleged that an adjudication of either the plaintiffs water rights or of the relative rights on the Muddy River district has been established by the engineer. As to whether or not these allegations, if affirmatively set up by way of answer, would constitute a sufficient defense to defeat the contention of appellants is not before us at this time.

The court, in discussing the provisions of the Nevada Constitution which prevent an appeal from the decision of the State Engineer, said (37 Nev., p. 399):

It is not shown that there are any adjudications decreeing vested water rights in the Muddy River district, nor do these plaintiffs seek to establish their right against the defendant by reason of any decree or adjudication. Moreover, if any determination had, prior thereto, been made by the State Engineer as to water rights in the Muddy River district, they would not be such as would preclude the plaintiffs in this case from filing their action under the allegations therein set forth and securing temporary injunction from an act of the engineer which might unjustly deprive them of their vested rights. An action of this nature is the only means of redress available to plaintiffs to protect them from unreasonable or unjust acts on the part of either the State Engineer or the Water Commissioners, because no redress is afforded them by the Water Law of 1913, inasmuch as the district court could not take cognizance of the proceedings of the State Engineer by way of appeal as therein prescribed; the Constitution, restricting, as it does, the appellate jurisdiction of the district court to cases appealed from justices' courts and municipal tribunals.

As we have said, the Constitution of Oregon differs from that of Nevada, in that the Oregon Constitution permits appeals to be taken from an administrative board or officer. The provision for review of any action of the Board before the courts of the State, is ample and complete, under the Oregon statutes.

As the bill of complaint in *Knox v. Kearney*, *supra*, failed to show that a determination of rights had been made, and the questions involved arose on demurrer, the complaint showed an interference with plaintiff's vested rights, which was not founded on any authority conferred by statute. A presumption that official duty would be properly performed would not, so the court held, overcome the allegations of the complaint to the effect that he was proceeding without authority.

A different question is presented by the case at bar. In the bill of complaint certain allegations are made to the effect that the State Board claims the right to take charge of the distribution of water from the stream and distribute the water in accordance with its adjudication (p. 26, appellant's Brief). Certain other rather vague statements are made to the effect that the State Board makes certain claims to close and regulate headgates, etc., etc. All of these allegations are based upon the theory that the State Board has no authority to assume control over a stream system after its determination is made. Under the statute (Sec. 28, p. 14, appellant's Brief) the State Board is authorized to control the division of water "during the time the hearing of the Board is pending in the circuit court and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board." By filing a stay bond, under Section 29, the operation of the order of determination may be stayed in whole or in part.

In the case of *Wattles v. Baker County*, 59 Ore. 255, it was held that the Board had no authority, under this act, to distribute water from a stream before the rights and priorities of the parties had been determined under this act. It is thus clearly apparent that until a determination is made by the Board, no control can be assumed. After the Board makes its determination and files it in the circuit court, clearly the Board is authorized to take charge of a stream system and distribute the water. The Supreme Court of

Nevada in *Ormsby v. Kearney, supra*, very clearly held that the State Engineer had authority to assume control under the Nevada statutes after his determination, although only for administrative purposes. This case, following *Knox v. Kearney, supra*, clearly shows that the very power which appellant denies, exists, even in an administrative board. The opinion in *Knox v. Kearney, supra*, proceeded upon the theory that no determination whatever had been made, because the bill of complaint failed to allege that fact. It is not authority for any contention that an administrative officer may not assume control of a stream system after a determination by him of rights, and the later case of *Ormsby v. Kearney* clearly holds that such action is valid.

It is, of course, to be presumed that the State Water Board of Oregon will proceed according to the statutes and decisions of the State courts, and will assume no authority not expressly authorized or necessarily implied. The correct rule in *Knox v. Kearney* was undoubtedly stated in the dissenting opinion of Mr. Justice Norcross, who said (37 Nev., p. 403):

The allegation that the appellants have, "without any authority of law therefor and without right * * * closed the headgate of their flume ditch" is a mere conclusion of law. Before a court is authorized in issuing an injunction against the officials of a water district the facts should be clearly alleged in the complaint showing the establishment of said district, the determination of the relative rights of water appropriators or users, and that such officials are acting in violation of such established rights. In such a case, water appropriators or users whose rights have been determined in accordance with the statute to be prior in time, and whose rights may be affected by the suit, are necessary parties. The case of *McLean v. Farmers' H. L. C. & R. Co.*, 44 Colo. 184, 98 Pac. 16, is substantially on all fours with the case at bar, and supports the position I have taken.

It is clearly to be seen that this case is not applicable to the questions here involved and has no force whatever in support of appellant's contention.

It is admitted by appellant's counsel that appellant may be required to appear and submit its rights to a tribunal having jurisdiction to make a final adjudication, and we

have said that such tribunal is provided for. The contention, however, that an administrative board may not compel the owner of property to submit to its jurisdiction, due process of law being accorded, we find no authority to support. Instances are so numerous and common of the power of administrative officers, in this respect, that mere reference to a few instances should be sufficient. Within the scope of the powers of any of the three departments, whether legislative, executive, or judicial, any owner of property may be called upon to defend his title. The legislature of a state may delegate judicial powers, purely, to an administrative officer, and no interference with the Federal Constitution results, although the provisions of the State Constitution may be contravened. It is, therefore, apparent that, whether we call the Board a court or an administrative body, is not material so far as the right to require the owner of a water right to appear, with the usual penalty of a default, is concerned. The Supreme Court of Wyoming, in passing upon this feature of the case, and upholding the power of an administrative board in this respect, said, in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 145:

It is certainly a mistaken notion that the legislature is powerless to require an owner of a property right, however long that ownership may have subsisted, to submit his claims to a legal tribunal, in an authorized proceeding, upon due and proper notice for determination as between him and other claiming interests in the same subject matter. When the subject of the right is water, and the right is confined to its use, the water itself belonging to the public, which assumes to control its appropriation and distribution, the legislature may, undoubtedly, require all parties to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, instead of the assertion of the individual consumer, so far as the public records are concerned, and that the interests of the public and all interested parties may be protected.

The authority of courts to require parties to appear and submit proof of their title to property in a prescribed manner and form is well stated in the case of *Miles v. Strong*, 68 Conn. 273, 287; 36 Atl. 55. A statute in Connecticut pro-

vided for a suit to quiet title to land as against one or several defendants, and provided that each defendant should, "in his answer state whether or not he claims any estate, interest in, or incumbrance on said property, or any part thereof, and if so, the nature, and extent of the estate, interest or incumbrance which he claims, and he shall set out the manner in which and the sources through which such estate, interest or encumbrance, is claimed to be derived." The court said :

Equally unfounded is the claim that the act deprives defendants of due process of law. In proceedings under this act a defendant is at liberty to make any legitimate defense open to him, under the laws and practice of this state, as in other cases, and to have the issues tried and determined by court or jury, as the case may be, as in other cases; and this is due process of law. It is true that under this act a defendant may be compelled either to say that he claims no interest at all in the property, or to state fully just what his claim is; but this is no hardship, for if he has no claim he ought to say so, and if he has, it cannot harm him merely to state in his own way what it is.

To the same effect are the cases of *United States v. Throckmorton*, 4 Sawyer, 42, and *Botiller v. Dominguez*, 130 U. S. 238, cited by appellant on pages 43, 44 and 45 of appellant's Brief.

When, however, the administrative body is an arm or agency of a court of the State, the jurisdiction of which is undoubted, the frailty of appellant's contentions become apparent.

The duties of the State Water Board, as outlined in *In Re Willow Creek*, 74 Ore. 592, are administrative. The findings of the Board are advisory, although *prima facie* final and binding until modified by the court on review. The court, in this case, makes the following comparison :

The duties of the Board of Control are similar to those of a referee appointed by the court.

And in the case of *In Re Silvies River*, 199 Fed. 495, 502, the court makes a similar comparison :

Insofar as the board has jurisdiction over the adjudication of water rights, it is, in effect, a standing examiner, created by the state, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be authoritatively settled and determined by a judicial tribunal. Until the report is made and filed with the court, there is no action or suit within the meaning of the removable statute.

In the case of *Patterson v. Northern Trust Co.*, 170 Ill., App. 501, p. 511, where it was held that an order to a master in chancery to take and report testimony to the court, with his conclusions of law thereon, it was said:

A master's report in pursuance of such an order is merely advisory. It has no force or effect as an adjudication. The parties are not concluded by its findings; while *prima facie* correct, they are not binding until approved by the court.

We call attention to the quotation from *Botiller v. Dominguez*, 130 U. S. 238, on page 45 of appellant's Brief, and we repeat it in part here:

Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a *guarantee of judicial proceedings*, so that his title could be established if it was found to be valid, or rejected if it was invalid.

What difference can it make to appellant, we may ask, whether it presents its claim to a board of an administrative character, with every opportunity to present any defenses it may have, as fully and completely as if it were before a court, with a guarantee of judicial proceedings before its claim can be found either valid or rejected as invalid? It is admitted that it might lawfully be compelled to submit to the jurisdiction of a court or a special tribunal, yet it is denied that it can be compelled to submit to an arm or agency of that court for exactly the same purpose, and under a full and complete statutory guarantee of a review by the court,

and the same right of appeal to the Supreme Court that every litigant possesses.

The Supreme Court of the State of Oregon has, indeed, ruled that one duly served with process in these proceedings must appear and submit proof of his claim. In the case of *Pacific Live Stock Co. v. Cochran*, 73 Ore. 417, 428, it was said:

It is evident that a failure by the claimant of a water right to appear and submit his claims when properly required to do so bars his right to assert it thereafter to the same extent that a party is barred who makes default after service of summons in a proceeding at law * * *. It is not necessary here to decide whether the proceeding by the Board to determine water rights is judicial or administrative. To a large extent it is administrative, but like many proceedings of that character the Board must also act in a *quasi* judicial capacity. A determination of the water rights to a stream finally ends as a report to the circuit court, and a decree of final determination by that court.

In the case of *In Re Willow Creek*, 74 Ore. 592, 614, 617, 618, 619, it is clearly held that only those who are served with process or appear in the proceedings are bound by the decree. It is evident, therefore, that the contention made by appellant on page 105 of its brief, respecting unknown claimants, who are assumed to be adverse parties, has no application to this proceeding, because the proceeding lawfully embraces only known claimants, who are properly served with notice.

The difficulty with appellant's contention (particularly referring to pages 78 and 77 of appellant's Brief) is that no attempt is made to draw a distinction between the proceedings before the Board and those had in court. We might, if we thought necessary, refer to many instances wherein a proceeding is at one time administrative in character and at another time judicial in character, the proceeding always being the same proceeding. Such is the case in the event of an appeal to a court in any administrative proceeding, which thereupon becomes judicial in character.

Thus, in *Upshur County v. Rich*, 135 U. S. 467, an administrative proceeding was held not to be a suit, but became a

suit on appeal to court with judicial powers. And in the case of *Waha-Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.*, 158 Fed. 137, administrative proceedings before the State Engineer to cancel a permit were held non-judicial in character, but after an appeal had been taken to a court, the proceedings became a suit. The same principle is expressly made a part of the statutes in question, for it is provided in Section 26 of the act (p. 13, appellant's Brief) that "from and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity." This section, as amended in 1913, remains the same in this respect. This construction is emphasized in *In Re Willow Creek*, 74 Ore. 592, 610, 611. To the same effect, see *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510.

(E) The statutory provision (Sec. 17, p. 9, appellant's Brief) requiring claimants at the time of their appearance in the proceedings to pay certain fees is not a denial of due process of law nor of the equal protection of the law. Whatever other expense the appellant may incur is a matter of discretion with it, optional to a large extent, and controllable by it.

We have already shown that such expense as the appellant, as the owner of property subject to the sovereign powers of the State, may incur by reason of a proper exercise by the State of its police powers are not in any sense a deprivation of property without due process of law nor for a public use without just compensation, nor a taking for a private use. We have also shown, we think, that these proceedings are instituted by the State under its police powers of regulation and control.

Throughout appellant's Brief and the bill of complaint are indefinite statements of large expense (which it is said will amount to \$50,000.00) if the appellant is required to proceed before the State Water Board. Inasmuch as there is nothing to indicate that as great or greater expense would be incurred by its proposed suits in the federal court, and its desired transfer of the proceedings to that court, it becomes apparent that appellant does not object to the expense, if the money may be expended before another tribunal than the Board and the State courts. Indeed, the whole argument comes to this, that it is willing to expend

that amount if assured of a final determination of its rights by a judicial tribunal, and the judicial proceeding be such as to insure an opportunity to remove the same to a federal court.

We have, of course, no means of knowing how much appellant will ultimately expend in this litigation and in collateral suits and proceedings in State and federal tribunals. So, therefore, we may admit that it will not fall far short of \$50,000.00, or may even exceed that amount, since it is a matter which is purely discretionary with appellant. The Federal District Court disposed of the contention relative to these indefinite expenses in the following language (217 Fed. 95, 99) :

The other probable expense referred to in the bill, such as attorneys' fees and cost of procuring evidence on behalf of complainant, are not required by the statute to be paid or incurred but are within the control of the complainant and as such may be incident to any proceedings in which it deems its interests are involved.

We are not disposed to answer further this contention of appellant, but as to the alleged disastrous results which may flow from a valid act, lawfully exercised, we quote from *Flint v. Stone Tracy Co.*, 220 U. S. 108, 169 :

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

In respect to the fees which appellant has been required to pay by Section 17 of the act, another question arises. We preface our argument with the statement that appellant has paid these fees, and this is not an action to recover them. This part of appellant's case was disposed of by the Federal District Court as follows (217 Fed. 95, 98) :

It is claimed that since the statute provides that any party who fails to appear after notice and sub-

mit to the Water Board proof of his claim shall be barred from subsequently asserting any rights thereafter acquired, the provision requiring him to pay a fee for so doing is in effect depriving him of his property without due process of law. It is not necessary for us to determine that question in this case. The bill of complaint shows that the complainant has paid the required fee and filed its claim before the Board and therefore is not being deprived of any right it may have to the waters of the stream.

Prior to the institution of this suit, and after filing its claim with the Board and paying the fees, appellant brought an action in the State courts to recover the fees paid to the Superintendent of the Water Division authorized to collect the same, upon the ground that the same had been paid under protest and illegally collected by the Superintendent. The case came before the Supreme Court of Oregon (*Pacific Live Stock Company v. Cochran*, 73 Ore. 417) and it was there held that this provision of the statute in no wise deprived appellant of its property without due process of law or of the equal protection of the law, and contravened neither State nor Federal Constitution. The court said:

It is not necessary here to decide whether the proceeding by the Board to determine water rights is judicial or administrative. To a large extent it is administrative, but like many proceedings of that character the Board must also act in a *quasi* judicial capacity. A determination of the water rights to a stream finally ends as a report to the circuit court, and a decree of final determination by that court. The Board is required to take testimony which consumes the time of a stenographer paid by the State; to make, through the State Engineer, an examination of the stream and the works diverting water therefrom, including the measurement of the discharge of the stream and of the capacity of the various ditches and canals; to examine and measure the irrigated lands and to gather such other data as may be necessary; to reduce the same to writing and make it a matter of record in the office of the State Engineer; to make maps and plats of the various ditches and of the stream—all at the expense of the State. That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title

goes without saying. The people in general, for instance taxpayers in the western part of the State, have little or no interest in the determination of the question as to whether the title of the Pacific Live Stock Company to a particular quantity of water is settled one way or the other. The proceeding is primarily beneficial only to the parties in interest, and in justice they should bear their share of the cost. Nor does the fact that they are not the moving parties alter the situation. It has always been the custom for courts to demand of litigants, whether plaintiff or defendant, fees to partly defray the expenses of litigation—clerk's fees, trial fees, and others of like nature—and to forbid the filing of papers or the trial of a cause until such fees are paid. The only limit to this power is that the fee shall not be disproportionate to the service rendered. In the case at bar it is contended that the rule established by the statute is arbitrary and not so proportioned. It is, of course, difficult to fix a rule that will apply with mathematical nicety to every case, but in the present instance it is reasonable to assume that the expense to the State of the investigation, mapping, taking testimony, and other rights involved in the determination of the claimant's rights will equal and in many cases exceed the amount of the fee charged; and that the method indicated by the act by which the amount is determined is eminently fair.

As appellant has paid these fees, there is nothing to be gained by questioning on this appeal the constitutionality of the section adverted to. The section providing for these fees has been held not to constitute a violation of any provision of the State Constitution by the Supreme Court of Oregon. The fees are, in fact, very reasonable, considering the expense to which the State is put in making the preliminary investigations required by the act, and are only a forced contribution to an expense which appellant has been largely instrumental in creating, and which is for its benefit, as much as for the benefit of any other claimant. The benefits derived by appellant are fully set forth in the opinion in *Pacific Live Stock Co. v. Cochran*, *supra*. The expense of making necessary surveys, preparing maps, measuring ditches and streams, and gathering other information, as well as the expense of taking large volumes of testimony,

and transcribing it, holding hearings, etc., under these statutes, is borne entirely by the State, and these fees are paid in to the State treasury to reimburse it in part for the outlay. As compared to the entire sum which appellant has laid aside to meet expenses of its own creation (\$50,000.00), the amount of the fees is comparatively insignificant. The method of apportioning the fees to be paid is certainly just and equitable. We are, indeed, surprised at the construction appellant's counsel has placed upon the clear and unmistakable language used by the United States District Court in this case (217 Fed. 95), quoted at page 57 of appellant's Brief, and again referred to at pages 58 and 59. It is said that the court "took the position that it was entirely optional with the complainant, as the owner of vested water rights, whether or not it would appear" in the proceeding, and, on pages 58 and 59, reference is made to the case of *Pacific Live Stock Co. v. Cochran*, *supra*, where the Supreme Court of Oregon held that it was not optional, but that the claimant must appear. It would seem that no one could possibly read the language used by Judge Bean in the opinion in the Federal District Court and arrive at the conclusion appellant's counsel has reached. The court was speaking of two different expenses of which appellant was complaining, being, first, the fees required by statute to be paid, and, second, the probable expenses such as attorney's fees and cost of procuring evidence, which the statute does not require to be paid or incurred. Nowhere in that opinion is a single word or phrase which would indicate that the federal court "took the position that it was entirely optional" whether appellant appeared or not. The court expressly refused to pass upon a moot question propounded by appellant as to the effect of the statute requiring fees to be paid because appellant had already paid the fees, saying:

The bill of complaint shows that the complainant has paid the required fee and filed its claim before the Board, and therefore is not deprived of any right it may have to the waters of the stream.

The other expenses, which appellant contended would be incurred the court said were not required to be paid but "were within the control of the complainant, and such as may

be incident to any proceedings in which it deems its interests are involved."

The court in *Pacific Live Stock Co. v. Cochran*, *supra*, was only considering the section of the statute requiring fees to be paid, and these other expenditures were not before the court in that case. That the courts reached exactly the same conclusion respecting the necessity for appellant's appearance, there can be no doubt.

We find throughout the Brief references to the determination of the Board, which, it is contended, is made final by the statute. (Particularly page 57, appellant's Brief.) The statute nowhere provides that the Board's findings are final or conclusive. But in so far as the decree of the circuit court is concerned, we contend that there is a final and conclusive adjudication, and that it is not optional with appellant to appear or not, as it may see fit, but it must appear, and submit to the jurisdiction of the State Board and the circuit court a statement of its claim to the waters involved or suffer the consequences of a denial of the sovereign power of a state to regulate and control the property of both residents and non-residents within its boundaries.

(F) If it should be the opinion of the court that the section providing for fees is invalid for any reason, it is clearly separable from the rest of the act.

The United States District Court, in its opinion, makes the following concise statement (217 Fed. 95, 99):

Moreover, if the provisions requiring a payment of fees by a claimant as a condition to asserting his right to the use of water is void, it is so clearly separable from the other provisions of the statute as not to render the whole act invalid. (*Berea College v. Ky.*, 211 U. S. 45.) It is analogous to a penalty provided for violation of a law which does not render the entire law void, where it is not unreasonable to believe that the law-making power would have adopted the statute without the penalty. (*Reagan v. Farmers' L. & T.*, 154 U. S. 362; *Flint v. Stone, Tracey Co.*, 220 U. S. 107.)

Where part of a statute is unconstitutional and can be eliminated without changing the effect and essential purpose of the law, it will not affect the validity of the rest of the statute. The test generally is whether, if the invalid

provision had been omitted, it could be presumed that the legislature would have passed the remainder of the act.

Sheldon v. Hayne, 261 Ill. 222.

Berea College v. Kentucky, 211 U. S. 45.

Reagan v. Farmers' L. & T. Co., 154 U. S. 362.

Flint v. Stone, Tracey Co., 220 U. S. 107.

The principle is thus stated in an Oregon case (*McMahon v. Olcott*, 65 Ore. 537, 549) :

* * * If an act is constitutional in one part and not in another, the portion which complies with the fundamental law will be enforced and the other disregarded.

In the case of *Flint v. Stone, Tracey Co.*, 220 U. S. 107, 177, it was said :

And so of the argument that the penalties for the nonpayment of the taxes are so high as to violate the constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collective or not, may be determined in a case involving an attempt to enforce them.

If no other provisions of the act in question violate the fundamental law, the invalidity of that section requiring the payment of fees would not of itself destroy the validity of other sections, provided they are enforceable without it, of which there can be no question in this case. A determination that this section of the act is unconstitutional would not be of any benefit to appellant, nor is such determination necessary. This court will not, we understand, where not necessary to a decision, pass upon the constitutionality of a statute. It was said in *Louisville & Nashville Bk v. Finn*, 235 U. S. 601, 610 :

This court does not sit to pass upon moot questions. * * *

The case of *St. Germain Irrigation Co. v. Hawthorn Ditch Co.*, 32 S. D. 260, cited by appellant, at page 46, involved a statute attempting to regulate the use of water, and such statute was held invalid in so far as it interfered

with vested rights. It was further held that the owner of such a vested right could not be compelled to secure a permit from the State Engineer. It was said, however:

There may be streams and other bodies of water in this state containing a surplus over and above what might be legally used by riparian owners and other lawful appropriators, which might be the subject of permit under the provisions of this statute.

There is nothing in this feature of the case applicable, as the Water Code of Oregon only requires permits to be secured in cases where one seeks to acquire a water right by appropriation, and has no reference whatever to existing rights, or prior vested rights.

Without citing any authorities for its action, the court further held that a provision of the statute apportioning the costs and expenses of adjudication among all parties in proportion to the quantity of water allotted each was invalid. The court's view was that "such procedure could only result in a fat benefit to some civil engineer" (page 269), and impose burdensome costs and expense upon the claimant.

The case is materially different from that presented by the Oregon statute. There is in the Oregon statute no proportionate distribution of costs, but simply a schedule of filing fees. The court said:

We believe there is a proper field for the regulation of water for beneficial use, provided for by this act, outside of what we term "objectionable features," objectionable because in conflict with various constitutional provisions. (P. 266).

And, on page 268, it was said:

In a certain limited sense water flowing in a natural stream belongs to the public; but the right to the use thereof is the subject of private ownership and property by riparian owners or others who have lawfully appropriated the same, *but the use thereof may be regulated by law and by the courts, to the end that each rightful user and appropriator may acquire no more thereof than his fair and equitable share.*

The general effect of the decision was to declare certain sections unconstitutional and to intimate that the act was otherwise valid.

(G) The determination of the State Water Board is not a final decree or adjudication of rights, but is *prima facie* correct and binding until modified by the circuit court in subsequent proceedings in that court.

It seems to be appellant's contention: *First*, that an administrative board cannot make a final determination, and a statute cannot require a property owner to appear before it, and if the determination of the Board is final, then the act is invalid. *Second*, that if the determination of the Board is not final, then the act is also invalid, in that it requires the property owner to appear before a board which has no power to make a final determination.

There can be no question as to the effect of a determination by the State Board. It is not final and is not binding, as we will presently show. But the proceeding terminates in a decree which is final and binding on all who have been duly served with notice.

Appellant takes the position, apparently, that the Board has power to make a final determination, and argues at some length (p. 71 of appellant's Brief) that the order of the Board is a final determination. The basis of this contention (as elsewhere in the Brief) is the effect to be given to certain sections of the statute. Section 24 (p. 12 of appellant's Brief) declares:

The determination of the Board shall be in full force and effect from the date of its entry in the records of the Board, unless and until its operation shall be stayed by a stay bond provided by this act.

The same section provides:

As soon as practicable thereafter (after the entry of the order by the Board) * * * the original evidence filed with the Board of Control shall be certified by the clerk of the Board, and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which said determination is to be heard. * * * Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the Board shall procure an order from said circuit court * * * fixing the time at which the determination shall be heard in said court.

This section was amended in 1913 by the Legislature (General Laws of Oregon for 1913, Chap. 97, p. 161)

and the section as amended is set forth in full following the statement of facts in this Brief. Nowhere in Appellant's Brief do we find a reference to this amendment, and we can only conclude that it must have been overlooked by counsel.

The section, as amended, provides that the Board shall procure an order from the circuit court, upon the filing of its "findings of fact and order of determination," fixing the time for hearing in the circuit court. The clerk of the court is required to "forthwith" forward a certified copy of the order to the secretary of the Board by registered mail, and the secretary, upon receipt thereof, is required to "immediately" notify by registered mail each claimant or owner who has appeared, of the time and place for the hearing in the circuit court, and proof of service of such notice is required to be made and filed with the court as soon as possible after mailing the notices. The statement is made by appellant (pp. 78-79 of appellant's Brief) that "when the matter reaches the court no process of any kind is issued from the court or served on the parties." Reference is made to the section as it was before the amendment. But as the section was before the amendment, however, this statement is not correct. Section 18 (p. 9 of appellant's Brief) provides for a notice, to be sent to each claimant, of the time and place for public inspection, and it is provided:

Said Superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court.

If it be contended that the process does not issue out of the court, the answer is that the issuance of process and the service thereof is not a judicial, but a ministerial act, which the Legislature may authorize an administrative officer to perform. The secretary of the Board, under the amended section, is the agent or officer of the court for the service of the process.

Section 28 of the act (p. 14 of appellant's Brief) provides:

During the time the hearing of the order of the Board of Control is *pending in the circuit court*, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of

Control, the division of the water from the stream involved in such appeal shall be made in accordance with the order of the Board.

Section 29 (p. 14 of appellant's Brief) provides that the operation of the determination of the Board may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending.

It will be noticed that no authority is conferred upon the Board to take charge of a stream system and distribute the water except "during the time the hearing of the order of the Board * * * is pending in the circuit court and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board." Plainly, until the Board has filed its findings, in the circuit court, no authority is conferred upon the Board to control the use of water by the several claimants. The order of the Board is in full force and effect from the time of its entry, but the statute does not authorize a distribution in the interim between the entry of the findings of the Board and the filing thereof with the circuit court. After the order is filed in the circuit court, any party may stay the operation thereof at any time by filing a bond.

Reverting to the character of the determination of the Board, it is plain that there is no final determination by the Board. In this connection we quote from the opinion in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73:

Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the State, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution.

In conformity with this familiar rule, we refer again to *In Re Willow Creek*, 74 Ore. 592, 610, where it is said:

In proceedings under the statute the Board is not authorized to make determinations which are final in character. Their findings and orders are *prima facie* final and binding until changed in some proper proceeding. The findings of the Board are advisory

rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject matter and of the persons interested and rendered a decree in the matter determining such rights, that, strictly speaking, an adjudication or final determination is made.

And in *Pacific Live Stock Co. v. Cochran*, 73 Ore. 417, 429, it is said:

A determination of the water rights to a stream finally ends as a report to the circuit court and a decree of final determination by that court.

And in the Federal District Court, in the opinion in the case at bar (217 Fed. 95, 98), it is said:

It thus furnishes interested parties not only adequate opportunity to be heard before the Water Board, but provides for a judicial review by the courts *before the determination becomes final*
* * *

And in the case of *In Re Silvies River*, 199 Fed. 495, 502, the same judge said:

The Board has no power to make an adjudication of the rights of the claimants. Its duty is to ascertain the facts and present them to the court for its consideration.

On page 72 of appellant's Brief, reference is made to the case of *Wattles v. Baker County*, 59 Ore. 255; 117 Pacific, 417. The case is not in point. The *finality* of the order of the Board was not considered nor determined. That was an action brought by a Water Master against the county to recover for services rendered as such officer, for which, under the statute, the county is required to pay. The owners of an irrigation ditch, having disagreed as to the division of the water, one of the owners notified the Water Master to take charge under the provisions of Section 38 of the act in question. There had been no determination whatever made of the rights involved, either by the Board or the court, and it was held that until the rights were determined and established the Water Master could not assume charge of the ditch and divide the water.

The statute itself provides what a final determination shall consist of. Section 33 (p. 15, appellant's Brief) provides:

The determination of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive, * * * etc.

In so far as it is contended that an administrative board cannot take charge of a stream system and control and regulate the use of the water without a final adjudication, we most earnestly disagree with counsel for appellant, and we need only refer to one of his leading cases, from which he has extracted an abundance of quotations. We have already had occasion to discuss the case of *Anderson v. Kearney*, 37 Nev. 314, at some length. Appellant's counsel cites this case as especially applicable to his side of this case at page 51 of its Brief. Particular reliance is placed upon the dissenting opinion. Two of the justices concurred in the decision that the State Engineer had authority to make a valid determination of rights, for administrative purposes, and had authority to take charge of a stream system and distribute the waters thereof, if he did not thereby impair vested rights, and such was the decree of the court, and it was held not to be an interference with vested rights to control those rights so that each appropriator should receive the amount he was entitled to in accordance with the evidence of his rights which he was required to submit. Two of the justices agreed that the Constitution of Nevada prohibited appeals from an administrative officer and that provisions of the statute permitting such appeals were nugatory and hence there was no opportunity afforded for an appeal. The dissenting opinion, upon which appellant relies so strongly, held very clearly (p. 823, 142 Pacific Reporter) that the Oregon statute afforded an opportunity for an adjudication by the courts, distinguished them from the Nevada statute, and plainly intimated that the Oregon statute afforded due process of law, because it provided for an adjudication by the courts.

It follows from this case that pending the final decree of the court, and while the matter is pending in that court, the control and regulation of the waters involved may be

placed legally in the hands of the Board without a final adjudication, and even though such adjudication was not provided for or possible under the statute, such administrative control could be assumed and maintained, so long as there was no interference with vested rights.

We think the provision for staying the operation of the Board's determination by filing a stay bond, is not an exclusive remedy, as the statute nowhere provides it shall be, and suggest that at any time prior to final decree the Water Master in charge might be enjoined in a proper proceeding from interfering with vested rights, in such manner as to impair those rights. We do not even contend that in such event the determination of the Board (not yet confirmed or modified by the court) would afford the Water Master protection unless such determination was correctly made, for, as held in *In Re Willow Creek, supra*, the order of the Board is only "*prima facie* final and binding." The effect of this decision, then, is, that such Water Master, in attempting to enforce the order of the Board before confirmation thereof by the court, if enjoined, would have the benefit of a *prima facie* correct determination, thus placing upon the plaintiff the burden of proof to overcome such disputable presumption.

We cannot pass from a discussion of this case without reference to the statements on page 79 of appellant's Brief, where it is said:

If the proceeding in the court is in the nature of an "appeal" then either the determination must be judicial * * * or the provision for an appeal is nugatory (citing *Anderson v. Kearney, supra*).

We have, I think, shown that the point that an appeal could not be taken from an administrative proceeding was, in the case last cited, based upon the peculiarity of the Nevada Constitution which prohibited it. We know of no provision of the Federal Constitution which prohibits an appeal under a state law, or a review by a judicial body of the proceedings before an administrative body. This proposition was clearly disposed of in the case of *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, which involved an order of the Railroad Commission of Washington in which it was

contended (see argument for plaintiff in error, p. 518) that the hearing provided for did not "constitute due process because the Railroad Commission of the State of Washington is not a court." It was said by the court that (p. 523) :

The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was the taking of property since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were laid.

The act involved provided that any railroad affected by the order of the Commission might institute proceedings in the superior court to review the order, within a certain time, or to prosecute an appeal. The court said (p. 526) :

Having been given full opportunity to be heard on the issues made by the complaint and answer and as to the reasonableness of the proposed order, and having adopted the statutory method of review, this company cannot complain. It had the right to offer all competent testimony before the Commission, which, in view of the form of the proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master.

This case also clearly disposes of the contention made by appellant on page 77 of its Brief, where the statement of the court that the Board acts in effect as a standing examiner is questioned.

The Constitution of Oregon differs very materially from that of Nevada. By Article VII, Sec. 9, of the Constitution of Oregon, the circuit court has the following jurisdiction:

All judicial power, authority and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts and they shall have appellant jurisdiction *and supervisory control* over the county court, and all other inferior courts, *officers, and tribunals.*

Under this constitutional provision appeals may be taken from administrative boards or officers. Such appeals have been provided for from the earliest times. (*Carothers v. Wheeler*, 1 Ore. 194; *Portland v. Kamm*, 5 Ore. 362; *In Re Schollmeyer*, 69 Ore. 210; *Kadderly v. Portland*, 44 Ore. 118, 155.)

Of course, whether an appeal may be taken from the decision of an administrative board or a court depends altogether upon the State Constitution, and statutes conformable thereto, authorizing such appeal.

Courts are constantly reviewing the proceedings before administrative boards and officers, both on appeal and otherwise. (*Waho-Lewiston L. & W. Co. v. Lewiston S. I. Co.*, 158 Fed. 137.)

In our view, it is not of much importance whether this is the continuation of an administrative proceeding or not. We think the proceedings before the State Water Board are purely administrative in character, involving, no doubt, certain *quasi* judicial features, but merely preliminary to the institution of judicial proceedings in the circuit court.

We think there can be no question but that the Legislature of Oregon has power to make the findings of the Board *prima facie* correct, and to require the claimant aggrieved thereat to assume the burden of establishing the incorrectness of those findings. (*Cinn., etc., Co. v. I. C. C.*, 162 U. S. 184, 196; *Meeker & Co. v. Lehigh R. R. Co.*, 236 U. S. 412, 430.)

It is within the power of the State to prescribe the rules of evidence, and to alter them, and to put the burden of proof upon one or the other of the parties by creating disputable presumptions (*Fong Yue Ting v. United States*, 149 U. S. 698, 729).

So, it was held that a statute making the findings and order of the Interstate Commerce Commission *prima facie* evidence of facts therein stated in judicial proceedings was merely the establishment of a rule of evidence and would in no wise work a denial of due process of law.

Meeker & Co. v. Lehigh R. R. 236 U. S. 412, 430.
Cinn. etc., Ry. v. I. C. C., 162 U. S. 184, 196.

And it was said in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81:

Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact or of several taken collectively shall be *prima facie* evidence of another fact. Many such exertions of this power are shown in the legislation of the several states, and their validity, as against the present objection, has been uniformly recognized save where they have been found to be merely arbitrary mandates, or to discriminate invidiously between different persons in substantially the same situation.

It is urged by appellant's counsel at pages 71 to 79, and pages 87 to 93 of its Brief, and at other places therein, that the proceedings before the State Water Board *must be* judicial in character, and much stress is placed upon the meaning of the word "determination," which, it is claimed, is (p. 72) a more adequate word to denote judicial action.

This involves a consideration of the effect of a decree or final order of a judicial body. The Supreme Court of Oregon has held that the Board has no power to make a final determination.

Sec. 24 (p. 12, appellant's Brief) of the act, as amended in 1913 (which was prior to the institution of this suit) provides that the Board shall make "findings of fact and an order of determination determining and establishing the several rights," which it shall file with the circuit court, after which (Sec. 26) "the proceedings shall be as nearly as may be like those in a suit in equity." Any party may file exceptions in the circuit court, and the court is authorized to modify the findings of the Board, and an appeal may be taken to the Supreme Court, but, unless exceptions are filed, the findings of the Board, which are *prima facie* correct, become conclusive, and the court is directed to confirm the findings and enter a decree in accordance therewith.

Prior to the amendment, Sec. 24 (p. 12, appellant's Brief) did not contain the words "findings of fact," but otherwise the section was not materially changed, provision being made for notice of the hearing in the circuit court.

It was said in *State ex rel. Hawkins*, 44 Ohio St., 98, 109:

What is judicial power cannot be brought within the ring fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power.

And *Underwood v. McDuffee*, 15 Mich. 361, 368, quoted in *Mackin v. Detroit-Timkin Axle Co.*, 153 N. W. (Mich.) 49, 53:

The judicial power, even when used in its widest and least accurate sense, involves the power to "hear and determine" the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial.

And in *Johnson v. Wabash R. Co.*, 168 S. W. (Mo.) 713, 715, it was said:

In other words, the judicial power referred to in the (State) constitutional provision, *supra*, has reference to the actual and real trial and determination of "matters of law and equity," and not to mere preliminary steps necessary to be taken for the institution of the suit in law or equity.

A judgment is the final determination of the rights of the parties in an action at law in a judicial proceeding before a court. It is the final determination of a judicial controversy. The Oregon statute (Sec. 179, L. O. L.) defines it as "the final determination of the rights of the parties in the action."

By Sec. 409 (L. O. L.) of the Oregon statute, a decree is defined as "the final determination of the rights of the parties thereto (in a suit in equity) and any intermediate determination is called an order. *Sears v. Dunbar*, 50 Ore. 36, 41; *Marquam v. Ross*, 47 Ore. 374, 383; *State v. Security Savings Co.*, 28 Ore. 410, 417.

A decree is rendered by a court of equity, as the final determination of an equitable proceeding pending before it.

In Oregon, only a final order can be appealed from. Thus, in *Thornburg v. Gutridge*, 46 Ore. 286, an appeal was attempted from findings of fact and conclusions of law, but the court held that "the circuit court did not proceed far enough. It has made its findings, but has omitted the essential feature that affords the requisite basis for an appeal; namely, the judgment or final order." The findings of fact and conclusions of law do not constitute the final order of the court, although they embody the decision of the court.

It is plain that in enacting the several provisions of the statute under consideration, the Legislature of Oregon had in mind the statutory meaning of "determination," and in the sense thus used, the word means "an intermediate" or preliminary order, not final in character. The decree, under the Oregon statute, is the "final determination of the rights of the parties" to the proceeding. The fact that the Legislature inserted the words "findings of fact" in Sec. 24, when amending it, serves to make still plainer the distinction.

In the case of *Beebe v. Russell*, 60 U. S. 283, 286 (19 Howard), it was said:

The reference of a case to a master to take an account upon evidence and from the examination of the parties and to make or not to make allowances affecting the rights of the parties, and to report his results to the court is not a final decree, because his report is subject to exemptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment.

(H) If it should be held that the provisions which permit the Board to take charge of the distribution of the waters of a stream system after determination by it and before final decree of the circuit court of the State are unconstitutional, then the sections providing therefor are clearly separable from the act, and do not in any way invalidate the rest of the proceedings. Appellant is not in a position to maintain the invalidity of this part of the act, because the Board has not yet made its determination, and until such determination is made no control can be assumed by the Board by the terms of the statute.

We need only refer to the cases cited under point (F) in support of this proposition. The provisions permitting

the Water Board to assume temporary control over a stream system are plainly separable and without them the act remains full and complete, and accomplishes the object sought, which is not mere temporary, but permanent control, after a final decree.

Appellant, however, is in no position to assail the entire act as invalid because of the authority thus vested in the State Board. No determination has been made by the Board, as appears from the bill of complaint, and hence no statutory authority exists for doing the acts which appellant alleges the Board will do unless restrained, such as closing down headgates, etc. The case of *Wattles v. Baker County*, 59 Oregon, 255, clearly holds that until rights have been determined the State Board has no authority to distribute water, regulate headgates, or assume any control over a stream, and the statutes are very plain in this respect. It is presumed that the several members of the State Water Board will obey the law which they are enforcing, and will perform their official duties in a lawful manner. Until, then, they attempt to enforce an invalid provision of the act, to appellant's detriment, no cause of suit arises.

(1) There can be no constitutional objection, under the Federal Constitution, because the Legislature of Oregon has provided a proceeding of a special character, not known to the common law, or because rules of evidence or forms and matters of procedure are changed by the act in question.

The point appellant seeks to make is that because the preliminary proceedings are before an administrative board, it is thereby deprived of due process of law. This objection, therefore, goes to the form of the procedure, and not to the point that a notice and hearing are not provided for.

The fact that this proceeding is new in form does not affect its validity if due process of law is afforded. It is substance, and not mere matters of form with which the Fourteenth Amendment is concerned.

We can find no authority, and appellant has cited not one, which holds that the Fourteenth Amendment is violated by a State statute which provides for administrative proceedings preliminary to a judicial determination of title to property.

It was said in *Tyler v. Wilkinson*, 175 Mass. 71, 74:

The prohibition in the Fourteenth Amendment of the Constitution of the United States against a state depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined Criterio of Justification, which may be found in ancient practice (*Murray v. Hoboken Land and Improvement Co.*, 18 Haw. 272, 277); or which may be found in convenience and substantial justice, although the form is new. (*Hurtado v. People*, 110 U. S., 516, 528, 531; *Holden v. Hardy*, 169 U. S. 366, 388, 389.) The prohibitions must be taken largely, with regard to substance, rather than to form, or they are likely to do more harm than good. *It is not enough to show a procedure to be unconstitutional to say that we have never heard of it before.*

And on page 81 of the same opinion it is said:

The act shows throughout the intent that no one shall be concluded without a chance to be heard, and, although some of its methods are new to this commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form.

And in the case of *State v. R. R. Com.*, 52 Wash. 17, 31 (see also, same case, *Ore.*, etc., *Co. v. Fairchild*, 224, U. S. 510), it was said:

It is true that the forms of law and procedure under which this Commission is acting are not in all respects like the forms and procedure governing other courts; and in the language of many of the cases cited by the counsel for appellant and repeated by the appellants themselves in their arguments, in some respects "it is not a proceeding under the forms and with the machinery provided by the wisdom of successive ages." But it occurs to us that it makes no difference whether it is a proceeding under the forms and machinery provided by the wisdom of successive ages, or whether it is under the powers and proceedings provided by this age. Law is a progressive science, and must necessarily regard the changing conditions of society and of the business of the country, and the legislature and courts of today ought certainly be as well qualified to provide machinery for the guidance of a commission as was

the law-making power two hundred years ago. The essential idea does not take cognizance of the antiquity of the powers and machinery under which the Commission is acting, but of the question whether, under such powers and the working of such machinery, the respective legal rights of the carriers and the people are preserved.

And in *Brown v. New Jersey*, 175 U. S. 172, 175, it was said:

The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.

And in *West v. Louisiana*, 194 U. S. 258, it was settled that:

The limit of the full control which the state has in the proceedings of the courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

And in *Fong Yue Ting v. United States*, 149 U. S. 698, 729, the court held:

The presumption which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.

And the rule was clearly stated in *League v. Texas*, 184 U. S. 156, 158:

Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed. "There is no vested right in a mode of procedure. Each succeeding legislature may estab-

lish a different one, providing only that in each are preserved the essential elements of protection." (*Backus v. Union St. Depot Co.*, 169 U. S. 557, 570.)

And in *Holmes v. Hunt*, 122 Mass. 506, 516 (cited with approval in *Meeker & Co. v. Lehigh V. R. R.*, 236 U. S. 412, 430), it was said:

The constitutional power of the legislature to prescribe rules of evidence is well settled. * * * This power has been often exercised by the legislature with the sanction of the courts, so as to change the burden of proof, or affect the question what shall be deemed *prima facie* evidence at the trial before the jury.

And in *Ballard v. Hunter*, 204 U. S. 241, 255, the court said:

A precise definition has never been attempted. It does not always mean proceedings in court. * * * Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case.

And in *Hurtado v. California*, 110 U. S. 516, 537, it was held:

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. (Quoted in *Reetz v. Michigan*, 188 U. S. at p. 508.)

And in *Duncan v. Missouri*, 152 U. S. 377, 382, it was said:

* * * The prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition.

In the case of *Twining v. New Jersey*, 211 U. S. 78, 101, the defendants had been indicted, tried and found guilty in the state courts upon a criminal charge. The court there

held that due process of law did not mean necessarily procedure settled in England prior to the emigration of our ancestors to this country (p. 110) saying:

If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment.

But "due process," the court considered, only included the "fundamental rights" incident to due process and "therefore an essential part of it" (p. 106), and it was said:

Under the guise of interpreting the constitution we must take care that we do not impart into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations.

And on page 110 it was said:

Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction * * * and there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law.

The greater part of appellant's bill of complaint and Brief attacks the *form* of the procedure. It is asserted that the rule respecting the burden of proof has been changed, etc., etc. The statute nowhere attempts to change the rules of evidence or the burden of proof at the several hearings before the Board. If it did, it would not be invalid for that reason. Nor is there any provision for the allowance of claims without evidence. Nor is the claimant even compelled to institute contests before the State Board. He may wait until the matter is in the circuit court, and here bring a contest by way of exception. This is settled by the decision in the case of *In Re North Powder*, 144 Pac. 485; 75 Ore. 83. In that case certain water users, in a proceeding under this

statute, failed to contest the right of a milling company before the Board, and afterward took exceptions to the order of the Board which allowed the claim of the milling company. It was objected that the water users had not filed contests against the claims of the milling company before the Board, as provided in Sec. 19 (p. 10, appellant's Brief) and it was contended that the right to contest was thereby waived, but the court held that the water users were not required to file contests before the Board, but might take exception in the circuit court, and thereby initiate a contest, and have the testimony taken. No rights to object to the claims of other parties were deemed waived by failure to file a contest before the Board.

We think it is clear that the objections which appellant has to the form of the proceeding is no reason for declaring it invalid. A concise statement of the principle is found in *Simon v. Craft*, 182 U. S. 427, 436:

The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form.

And it was said at page 437:

But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.
* * * If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the practice pursued in the particular case.

(J) The statute provides proper notice and ample opportunity to be heard and therefore due process of law is afforded.

It must be admitted that this proceeding is one *in rem* or *quasi in rem*. Appellant's counsel say it is a suit to quiet title. We think it is a proceeding more nearly like a partition suit, insofar as an adjudication of undetermined interests in water can be said to resemble any proceeding affecting the title to land. In either case, however, constructive notice is sufficient.

The statute requires: *First*, publication of notice in two issues of a newspaper of general circulation in the counties in which the stream is situated, the last publication to be made at least thirty days prior to the beginning of the taking of testimony. Such notice is required to set forth the time and place for the beginning of the taking of testimony. (Sec. 12, p. 7, appellant's Brief.)

Second, a notice must be sent to each claimant by registered mail, similar to the published notice, and to each riparian owner, so far as they can be reasonably ascertained, setting forth the date and place where the taking of testimony will begin. This notice must be mailed at least thirty days prior to that date. (Sec. 13.)

Third, after the taking of *ex parte* testimony and receiving and filing statements of claim, the Superintendent (Sec. 18) is required to give notice to the various claimants, by registered mail that the *ex parte* evidence taken theretofore will be open to inspection, not less than ten days thereafter, at a place to be named in the notice, for a period of not less than ten days. The notice is also required to designate the county in which the determination of the Board will be heard by the circuit court.

Fourth, in the event that any person interested files a contest before the Board, notice of the time and place of hearing must be served "in the same manner as summons are served in civil actions in the circuit courts of this State," not less than thirty nor more than sixty days prior to the hearing. At the hearing the Superintendent is authorized to issue subpoenas and compel the attendance of witnesses and compel such witnesses to testify. (Sec. 20.) As amended, this section (Laws of Oregon 1913, p. 139) provides for the taking of depositions to be used in such contests.

Fifth, after the testimony is taken in contests, the same, with all other evidence, is filed with the Board, which makes findings and an order of determination of rights, and files the same with the circuit court. Thereupon is instituted a proceeding in the nature of a suit in equity. Under the act as amended in 1913, the Board is required to procure an order of the court fixing the time for hearing, a copy of which order is required to be "forthwith" transmitted to the secretary of the Board by registered mail, and the secretary

is required to "immediately" notify each claimant who has appeared of the time and place for the hearing in the circuit court. Proof of service is then to be made and filed with the circuit court (Sec. 24).

Sixth, any party may file exceptions to the findings (Sec. 25, as amended by Laws of Oregon 1913, p. 161) prior to the hearing and further hearings on exceptions are provided for. A copy of the exceptions is required to be served on adverse parties in contests. All parties may be heard upon the consideration of the exceptions. The cause may be remanded for further testimony to the Board, or to a referee appointed for that purpose, and the Board may be required to make a further determination. Appeals may be taken to the Supreme Court within 60 days, which is now the time limit for all appeals to that court.

It is evident that here all the essential elements of due process of law are assured, including that of a judicial tribunal to hear and determine finally the matters at issue. We know of no other proceeding, suit or action in this State wherein the right of the parties to notice and hearing is more carefully safeguarded.

Only those parties who have been duly served with notice are bound. Unknown claimants are not included. In the case of *In Re Willow Creek*, 74 Ore. 592, 614, the court said:

In the proceeding under consideration we are not to pass upon the right of any parties except those whom the record shows to have been duly served with process or to have appeared in the proceeding: *Leffingwell v. Lane County*, 64 Ore. 144, 151 (129 Pac. 538).

And it is said at page 617:

The objections to the process are evidently directed to that part of Section 34 referring to persons who are interested in the water of a stream upon which an investigation and determination are made, upon whom no service of notice is had. Section 33 in effect declares a decree of the court confirming a determination of the Board to be conclusive as to claimants lawfully embraced in the determination. This declaration precludes making such decree or order of determination binding and conclusive upon any except those upon whom service of notice has been made pursuant to the statute.

Concerning the sufficiency of the notice the court said at page 619:

Ample provision is made in the law for a notice to all interested parties, and that they may be duly heard in court. It is not necessary that notice be given of each step in the proceeding.

Notice by registered mail is held sufficient at page 620:

It is within the province of the Legislature to say that registered mail may be used as a means of conveying a notice, when publication is also required and especially where in case of dispute a notice of contest is required to be served and returned the same as a summons in an action in the courts: *Farm Investment Co. v. Carpenter*, 9 Wyo. 110 (61 Pac. 258, 87 Am. St. Rep. 918, 50 L. R. A. 747); *Tyler v. Judges, etc.*, 175 Mass. 71 55 N. E. 812, 51 L. R. A. 433; *Town of Hinckley v. Kettle River Co.*, 70 Minn. 105 (72 N. W. 835). The act is not inimical to the organic law in respect to due process.

In *Tyler v. Court of Registration*, 175 Mass. 71, 79, a statute providing for proceedings to secure the registration of land titles, provided for notice to all claimants by mailing a copy of the published notice to every person therein named whose address was known, and publication. The court said:

It hardly would be denied that the statute takes great precautions to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state and remaining undiscovered, notice by publication must suffice of necessity. As to claimants living within the state and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by messenger and sending it by the postoffice beside publishing in a newspaper, recording in the registry and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents

by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required.

And, after quoting from the above opinion, it was said in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 152:

Now our statute requires the notice to be sent by registered mail, thus insuring more certainty in reaching the proper party, and as well in most instances securing personal delivery; and in all cases the return of a card indicating its receipt. We can perceive no reasonable objection to that manner of sending notice to known claimants in the character of proceeding we are considering, at least where publication is also required.

We have heretofore shown that this is a proceeding *in rem* or *quasi in rem*. The principle applicable here is thus discussed in *Grannis v. Ordean*, 234 U. S. 385, 394:

In determining what is due process of law within the meaning of the Fourteenth Amendment, a distinction is to be observed between actions in *personam* and actions in *rem* or *quasi in rem*. * * * But it is also settled that where a state has jurisdiction over a *res*—as, of course, it has over the partition of lands lying within its borders—the judgment of the court to which that jurisdiction is confided in order to be binding with respect to the interest of a non-resident who is not served with process within the state, must be based upon constructive notice given by publication, mailing or otherwise substantially in the manner prescribed by the law of the state * * *. *The fundamental requisite of due process of law is the opportunity to be heard.* And it is to this end, of course, that summons or equivalent notice is employed. But the inherent authority of the states over titles to lands within their respective borders carries with it, of necessity, the jurisdiction to determine rights and interests claimed therein by persons resident beyond the territorial limits of the state, and upon whom the ordinary judicial process cannot be served. The logical result is that a state, through its courts, may

proceed to judgment respecting the ownership of lands within its limits, upon constructive notice to the parties concerned who reside beyond the reach of process. That this constitutes "due process" within the meaning of the Fourteenth Amendment was recognized in *Pennoyer v. Neff*, *supra* (95 U. S. 714), and is no longer open to question.

In *Ballard v. Hunter*, 27 Sup. Ct. Rep. 261, 266 (204 U. S. 241, 254), there was involved a statute which required personal service of summons upon resident owners or occupants of lands and constructive service by publication upon non-residents. It was contended that discrimination was here made. The court said :

We have no doubt of the power of the state to so discriminate nor do we think extended discussion is necessary. Personal service upon non-residents is not always within the state's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource.

And in *Hamilton v. Brown*, 161 U. S. 256, 274, it was held that a state has power :

To provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the courts, after actual notice to all known claimants, and notice by publication to all other persons.

In the case of *American Land Co. v. Ziess*, 219 U. S. 47, at page 70, it was said :

We do not think it is important to determine the precise nature of the action authorized by the statute, since the method of procedure which was prescribed was within the legislative competency. So, also, we do not deem it important to discuss what constitutes a judicial proceeding, since the statutory proceeding provided by the act was within the authority of the state to enact, and that it was judicial in character has been expressly determined by the court of last resort of the state. Indeed, not only these, but all the contentions proceed upon a misconception as to the legislative authority of the state and the effect thereon of the due process clause of the Constitution of the United States. The error which all these

propositions involve was pointed out in *Twining v. New Jersey*, 211 U. S. 78, where, speaking by Mr. Justice Moody, the court said: "Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction (citing cases) and that there shall be notice and opportunity for hearing given the parties (citing cases) subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." (P. 71.)

Within the rule here announced we have in the instant case: First, a court having jurisdiction to determine the rights of the parties; to wit, the circuit court of the State; second, sufficient notice; and, third, opportunity for hearing given the parties.

(K) A hearing before final decree, with full opportunity to appear and defend, after notice, is all that can be adjudged vital under the guarantee of due process of law.

It was said in *Holden v. Hardy*, 169 U. S. 366, 387:

* * * While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation and that the Constitution of the United States which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

And in *Iowa Central R. R. Co. v. Iowa*, 160 U. S. 389, 393, it was held:

But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard *before the issues are decided*.

And in *Wilson v. Standefer*, 184 U. S. 399, 415, it was said:

It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time *before final judgment is entered*.

And in *Hooker v. Los Angeles*, 188 U. S. 314, 318:

The Fourteenth Amendment does not control the power of the state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard.

That the statutes in question guarantee to appellant the absolute and unqualified right to present all the evidence and testimony legally competent and proper it may have to offer; afford it ample opportunity to appear and defend and be heard, both in the preliminary proceedings before the Board and in the court; and after notice at each step of the proceeding; and all this before the final determination of its rights by a court of competent jurisdiction, there can be absolutely no question or contention.

The bill of complaint shows that appellant has received notice; that it has appeared and filed its claim and that it has exercised its right to file contests, and has contested every other claimant to the waters involved, and that, up to the time of this suit, every protection afforded by these statutes has been extended to it.

It was (appropriately applicable to this case) remarked in *Carnegie Gas Co. v. Swiger*, 79 S. E. (W. Va.) 3; 46 L. R. A. (N. S.) 1073, 1080:

That the statute in question, by proper proceedings, fully protects the rights of the owner, not only appears from its provisions, but has complete demonstration in the present proceedings taken under it. Defendant has been permitted to make every defense and oppose every legal obstacle in the way which could possibly be afforded him. Why, therefore, should we dwell further on this proposition.

(L) The statutes here involved do not deny appellant the equal protection of the law.

The Fourteenth Amendment requires that state legislation shall not abridge the privileges or immunities of citizens of the United States, nor deny to any person within the jurisdiction of the state the equal protection of the laws.

We need only refer, we think, to a few of the cases, in support of this point.

In *Duncan v. Missouri*, 152 U. S. 377, 382, it was said:

But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government
* * *

This provision of the Fourteenth Amendment means that no person or class of persons shall be denied the same protection enjoyed by other persons or classes of persons similarly situated; and when the courts of a state are open to all alike, with the same rules of evidence and modes of procedure applicable for the protection of their property and personal rights without discrimination, the equal protection of the law cannot be said to be denied.

Missouri v. Lewis, 101 U. S. 22.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

But this clause was not designed to limit the police powers of a state, and the enforcement of such regulations and restrictions as will promote the good order and welfare of society and advance its economical interests and prosperity. If all persons brought under the operation of the laws of a state are treated alike, the equal protection of the law is afforded.

Minneapolis, etc., Co. v. Beckwith, 129 U. S. 26;
9 Sup. Ct. 207; 32 L. Ed. 585.

It is only necessary that there be equality of protection among those similarly situated.

It would hardly seem necessary to call the court's attention to this objection of appellant. The statute attempts to make no distinction between claimants, does not require any claimant to assume any burden to which another similarly situated is not subject, and does not discriminate as between claimants. No essential distinction is apparent between these proceedings and other litigation in which appellant may become involved. Its rights will receive the same protection and it is entitled to the same consideration as any other party.

In concluding this branch of the case, we call attention to the statement in *Fallbrook v. Bradley*, 164 U. S. 112, 155, which is clearly applicable to statutes of this character, upheld, as they have been, by the courts of practically every Western State. It was said:

We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violates any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions, or any alleged ground that such decisions are in conflict with sound principles of general constitutional law.

II

APPELLANT CANNOT, BY A BILL IN EQUITY TO RESTRAIN THE STATE BOARD OR TRIBUNAL FROM FURTHER PROCEEDINGS UNDER THE STATUTES, REVIEW THE ACTION OF THE FEDERAL DISTRICT COURT IN REMANDING THE PROCEEDINGS TO THE STATE BOARD UPON THE GROUND THAT IT HAD NO JURISDICTION.

It would hardly seem that there could be any doubt upon this subject. Section 28 (36 Stat. L. 1094) provides that:

Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution *and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.*

The United States District Court disposed of this feature of the case with the following statement (217 Fed. 95, 97):

Whenever a suit commenced in a state court has been legally removed to the federal court the latter may, when necessary to protect its own jurisdiction or render effective its decrees, enjoin further proceedings in the state court. (*Deitzsch v. Huidekoper*, 103 U. S. 494; *French v. Hay*, 22 Wall. 250; *Wagner v. Deake*, 31 Fed. 849; *Abeel v. Culberson*, 56 Fed. 329.) But in this matter the court has refused to assume jurisdiction on the ground that it was not removable, and a bill in equity is not the proper method to review its judgment.

It was said in *In Re Hoard*, 105 U. S. 578, 580 (where certain defendants in a suit in a state court filed a petition for removal to a federal court) upon the question of the right to have reviewed the order of the federal court remanding a proceeding:

It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final.

And it was held that mandamus would not answer the purposes of a review or appeal.

In *Ex parte Ferry Company*, 104 U. S. 519, 520, it was held:

That it was no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction by appeal or otherwise. * * * It rests with Congress to decide whether a case shall be reviewed or not.

In *Morey v. Lockhart*, 123 U. S. 56, 57, 8 Sup. Ct. 65, it was said:

It is difficult to see what more could be done to make the action of the circuit court final for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

And in *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556 (16 Sup. Ct. Rep. 389, 396), it was said:

We see no reason for reconsidering these conclusions, and it may be regarded as settled that an order of the circuit court remanding a cause *cannot* be reviewed in this court by any direct proceeding for that purpose.

The right of removal is simply "a privilege of having the case tried in some other than the state tribunals. There is no property in it."

Manley v. Olney, 32 Fed. 708.

And in *Teel v. Chesapeake & O. Ry. Co.*, 204 Fed. 918, 920, it was said:

It follows that the privilege of removal is not in any sense a vested right, no matter whether it is based, as here, on diversity of citizenship, or upon a right of action created by federal law, like that given by the employers' liability act. The power in Congress to grant or withhold the right of removal is at last the power to prescribe the jurisdiction of the courts as already stated. Such power is continuing in its nature and of necessity includes authority to take away, as well as to bestow, the right to remove causes.

III

A BILL IN EQUITY TO RESTRAIN THE STATE BOARD FROM PROCEEDING UNDER A VALID STATUTE CANNOT BE MAINTAINED UPON THE THEORY THAT APPELLANT IS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE UNITED STATES DISTRICT COURT REFUSED JURISDICTION AND REMANDED THE PROCEEDING TO THE STATE BOARD.

The right of removal of a proceeding from a state to a federal court is not a vested right, but merely a privilege conferred by federal statutes. The refusal of a federal court to retain jurisdiction in this proceeding in no wise impaired any vested rights the appellant may have, and, if erroneous, the act of the federal court is not that of the State Board. The contention here made necessitates an understanding of the effect of an order remanding a proceeding.

In *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 516, it was said, where a party has moved to remand and the refusal of the federal court is properly presented to the Supreme Court:

If, in such a case, we think his motion should have been granted, we reverse the judgment of the circuit court and direct that the suit be sent back to the state court to be proceeded with there as if no removal had been had.

In Black's *Dillon on Removal of Causes*, Sec. 225, p. 366, this statement appears:

When a cause has been improperly removed from a state court to a federal court, and is remanded by the latter court for want of jurisdiction, the jurisdiction of the state court at once reattaches; no formal order of the relinquishment of jurisdiction by the federal court is necessary to enable the state court to resume its proceedings in the case. After the cause is remanded by the federal court, it should proceed in the state court as if no petition for removal had been filed. It is not necessary to begin the suit anew. The order of remand does not originate a jurisdiction in the state court, nor even,

properly speaking, restore a jurisdiction which was lost. It simply puts an end to the interruption of the state court's proceedings which was caused by the attempted removal.

In *Germania Fire Ins. Co. v. Francis*, 52 Miss, 457, 466, 467, it was said:

An order for removal in a case not embraced by act of Congress is void and has no effect in legal contemplation; and although its practical effect may be an interruption, improperly, of the prosecution of the cause in the state court, the cause is to be considered as having been all the time pending in the state court, which delayed to see if the United States court would take jurisdiction, and finding it would not, proceeds to try the case thus remitted to it as though no interruption had occurred.

And in *Knahtla v. O. S. L. R. Co.*, 21 Ore. 136, 140, the subject is thus discussed:

It is contended by appellant that the court below lost jurisdiction of this cause by the petition of defendant for removal to the Circuit Court of the United States and by the order approving the bond and transferring the cause to that court. The circuit court of Wasco County had, under the Constitution and laws of the United States and of this State, original jurisdiction of the subject matter and of the parties in this cause. That jurisdiction was formally invoked by the filing of a complaint and service of process on defendant, and the court was in the exercise of its unquestioned powers in the premises when the petition for removal was filed by defendant. Upon the filing of the petition and bond, the circuit court for Wasco County passed the order required by the statute of the United States governing the removal of causes from the state to the federal courts, but the federal court refused to entertain jurisdiction and remanded the cause to the state court, and its decision on that question is final. (*In Re Penn. Co.*, 138 U. S. 451.) It follows, therefore, that the cause never has in fact been removed to the Circuit Court of the United States. The removal is not complete until the United States court has taken jurisdiction, and this it has refused to do, so that the state court never lost its jurisdiction. When the circuit court of Wasco County granted the application for removal of the cause,

it simply declined to proceed further in the matter; but when it was ascertained that the order for removal was improper and that the United States court did not have jurisdiction, the cause revived in the state court and should have been proceeded with as though no order or removal had been made. (*Thacher v. McWilliams*, 47 Ga. 306; *ex parte State Ins. Co.*, 50 Ala. 464.)

That appellant has no vested right to have the proceeding removed to a federal court, is settled in *Kentucky v. Powers*, 201 U. S. 1, 24, where it is said:

The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be removed into a federal court unless warrant therefor be found in some act of Congress.

The right of removal is purely statutory. It exists only in such cases as Congress has seen proper to make provision for and without some federal statute no action brought in the state court can be removed to the federal court. Congress has, for instance, provided that no case arising under the federal employers' liability act should be removable from a state court. The power of Congress to do this has never been seriously questioned. We think it is settled that the state court is not ousted of its jurisdiction unless the cause is properly removable.

In *Moon on Removal of Causes*, p. 639, it is said:

The act requires a remanding order to be "immediately carried into execution." An order to remand is carried into execution by filing a certified copy thereof in the state court from which the cause was removed. It is then the duty of the state court to proceed with the cause, as if there had been no attempt to remove it. The order to remand completely restores the jurisdiction of the state court. The remanding order must be accepted by the state courts as a final adjudication that the suit is not a removable one.

Appellant has assumed that the proceeding before the Board is judicial and therefore it necessarily follows, if this be true, that the Board is a court or judicial tribunal. This

we deny, and the Supreme Court of Oregon has held otherwise; but if it is a judicial proceeding and the Board is a court, then a writ of injunction may not be granted to stay proceedings before the Board, the members of the Board having been made defendants, because Sec. 720 of the Revised Statutes provides:

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

IV

THE CONTENTION (PAGE 67, APPELLANT'S BRIEF) THAT, SINCE COMPLAINANT HAS TAKEN THE STEPS NECESSARY TO REMOVE THE PROCEEDING TO THE FEDERAL COURT, THIS SUIT MAY BE MAINTAINED TO RESTRAIN EITHER THE MEMBERS OF THE BOARD OR THE OTHER DEFENDANTS, IS UNFOUNDED, BECAUSE THE FEDERAL COURT HERETOFORE REMANDED THE PROCEEDING TO THE STATE BOARD.

The appellant refers to the rule that where proper steps have been taken to remove a case, a bill of equity may be maintained to enjoin further prosecution in the state court, and on page 68 of appellant's Brief it is said :

The only question, therefore, is whether or not the proceeding was removable.

We submit that appellant's counsel have overlooked one essential prerequisite of such suit, which is, *that the federal court must have retained jurisdiction*. It is admitted in the bill of complaint that the federal court in fact remanded the proceeding to the State Board and, therefore, that at the time this suit was instituted the proceeding was no longer pending before that court. No reason exists, therefore, why the federal court should issue a restraining order to protect its jurisdiction, which it says it never had and which, if it did have, it has voluntarily relinquished. We have already shown that the consensus of judicial opinion is to the effect that when a cause is remanded to a state court (paragraph II of this Brief) the jurisdiction of the federal court ceases, and the state court may then proceed as if the cause had never been removed. In other words, there cannot possibly in such case be a conflict of jurisdiction, and an essential element of such a suit as is here presented is an interference with the jurisdiction of the federal court.

In *Madisonville Traction Co. v. St. Bernard M. Co.*, 196 U. S. 239, 245, the rule upon which appellant rests its contention is stated thus :

After the presentation of a sufficient petition and bond to the state court in a removal case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating Section 720 of the Revised Statutes, forbidding a court of the United States from enjoining proceedings in a state court—to restrain the *party against whom a cause has been legally removed* from taking further steps in the state court.

And in *Ches. & O. Ry. v. Cockrell*, 232 U. S. 146, 155, it is clearly held that if the state court *refuses* to give effect to the petition for removal and the petitioner takes the steps necessary to remove the proceeding, the federal court may “to protect its jurisdiction” enjoin “the plaintiff from taking further proceedings in the state court *unless the cause should be remanded.*”

And it was held in *Springer v. American Tobacco Co.*, 208 Fed. 199, 200, that the judgment of the federal court on motion to remand is final and, because not appealable, is an “uncontestable adjudication of the question of the right to remove the case.”

The cases of *French v. Hay*, 22 Wall. 250, and *Dietzsch v. Huidekoper*, 103 U. S. 494, and some other cases cited by appellant on page 67 of its Brief hold that when the federal court has *acquired jurisdiction of a suit on removal* and rendered a judgment therein, the federal court may, by an ancillary bill, enjoin the bringing and prosecution in a state court of a suit in hostility to the judgment of the federal court.

In the case of *Birdseye v. Shaeffer*, 37 Fed. 821, 827 (aff'd 140 U. S. 117), it was held that after a cause has been removed from a state to a federal court, the state court is without jurisdiction to proceed further while the cause is pending in the federal court, but when the federal court voluntarily relinquishes its jurisdiction in favor of the state court, by remanding a suit to it, the state court again acquires jurisdiction.

It is the common practice of the federal courts to remand causes to the state tribunals, and for *the latter to proceed to a final determination without let or hindrance.*

It follows necessarily from the decisions we have referred to that there is no cause of suit because the complainant has taken the necessary steps to remove the proceeding, since the federal court remanded it to the State Board prior to the institution of this suit.

If any federal right of the appellant's was violated by the order of the federal court remanding the proceeding, the State Board is not responsible, and cannot be held to have decided against such right, for, as said in *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556:

A state court cannot be held to have decided against a federal right *when it is the circuit court, and not the state court, which has denied its possession.*

And the alleged error the federal court may have committed in remanding the proceeding cannot be reviewed in this *collateral proceeding* to restrain the State Board from proceeding further after the proceeding was remanded.

V

WE CONTEND THAT, REGARDLESS OF APPELLANT'S RIGHT TO NOW RAISE THE QUESTION, THE ORDER REMANDING WAS A PROPER ONE AND THAT THE PROCEEDING WAS NOT REMOVABLE BECAUSE (1) THE PROCEEDING WAS AT THE TIME (AND STILL IS) ADMINISTRATIVE AND PENDING BEFORE AN ADMINISTRATIVE BOARD; (2) THERE WAS NO SEPARABLE CONTROVERSY; AND, (3) THE STATE IS A NECESSARY AS WELL AS PROPER PARTY TO THE PROCEEDING.

(A) The proceeding before the Board is administrative, and though it may subsequently become a judicial proceeding, while it remains administrative and pending before administrative officers, it is not a suit or action brought in a state court and cannot be removed to the federal courts under Section 28 (36 Stat. L. 1094).

The United States District Court, on motion to remand the proceeding in *In Re Silvies River*, 199 Fed. 495, 501, in passing upon this contention, said:

The phrase "suits at common law and in equity" embraces not only ordinary actions and suits but includes all the proceedings carried on in the ordinary law and equity tribunals as distinguished from proceedings in military, admiralty and ecclesiastical courts. It is a very comprehensive term and is understood to apply to any proceedings in a court of justice by which an individual pursues a remedy which the law affords. Modes of proceeding may vary, but as it affects the rights of removal any civil proceeding in a state tribunal in which a judgment or decree is sought as to the rights of the parties and presented by the pleadings for judicial determination is an action or suit within the meaning of the statute, regardless of the forum or tribunal before which the matter is pending. (*Weston v. City Council of Charleston*, 2d Peters. 448-464; *Gaines v. Fuentes*, 92 U. S. 10.) And the state cannot, by creating special proceedings, or special tribunals, deprive the federal court of jurisdiction of such a suit or prevent a removal. (*In Re The Jarnecke Ditch*, 69 Fed. 161.) But a proceeding

carried on by or before executive or administrative officers in the exercise of their proper functions cannot be regarded as a suit or action, although it may become such on appeal to a court having power to determine questions of law and fact either with or without a jury, and where there are parties litigant to contest the case on one side or the other. (*Upshur Co. v. Rich*, 135 U. S. 467; *Waha Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.*, 158 Fed. 137). Now the preliminary proceedings before the state board of control, in taking testimony and making findings of fact concerning the rights of the various claimants to the waters of a given stream are, in my judgment, not judicial but rather administrative. The powers of the board are not brought into action by the filing of a paper in the nature of a complaint setting up asserted rights, but by the mere presentation to it of a petition or request by one or more users of the water without any allegations of issuable facts, other than that the petitioner is a water user on the stream and a request for the determination of the relative rights of the various claimants to such waters. No affirmative relief is asked and no adverse pleadings are required or permitted, or issues joined until after the evidence taken by the board is open to the inspection of the various claimants and owners. After the filing of the petition, the proceedings are to be conducted by the board and upon its initiative. Neither the petitioner nor the claimants obtain any redress for an injury as the result of such proceedings but merely evidence of their title or right to the use of the water. It is true the board is vested with power to issue notice to the various claimants requiring them to present their claims, to take testimony and make findings of fact, but these findings must be confirmed by the court. The board has no power to make an adjudication of the rights of the claimants. Its duty is to ascertain the facts and present them to the court for its consideration. After the evidence and determination of the board has been filed with the court, the proceeding probably becomes a suit or action, but until the board has completed its examination, made its determination and filed its report, the proceedings are purely administrative.

And in the case of *In Re Willow Creek*, 74 Ore. 592, 610, the Supreme Court of Oregon said:

The statute prescribing the duties to be performed by the Water Board and its members in their respective official capacities in a determination of water rights does not confer judicial powers or duties upon the Board or such officers in any sense as indicated by the Constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the Board is not authorized to make determinations which are final in character. Their findings and orders are *prima facie* final and binding until changed in some proper proceeding. The findings of the Board are advisory rather than authoritative. It is only when the courts of the State have obtained jurisdiction of the subject matter and of the persons interested and rendered a decree in the matter determining such rights, strictly speaking, an adjudication or final determination is made. It might be said that the duties of the Water Board are *quasi* judicial in their character. Such duties may be devolved by law on boards whose principal duties are administrative.

We have in a prior part of this Brief discussed at some length the subject of the character of proceeding before the Board, and we reached the conclusion that it was purely administrative, preliminary to a judicial proceeding in the circuit courts of the State, and we see no need of dwelling further upon the subject, but refer to those paragraphs. The consensus of opinion is seemingly against appellant's contention.

In the case of *Kaw Valley Dist. v. Metropolitan Water Co.*, 186 Fed. 315, 319, a statute provided for the formation of drainage districts and the appropriation of private property to the public use of the district, by a proceeding in which an application was made to the district court of the State, and thereupon the appointment of commissioners, who were authorized to give notice to the owners of property to be taken, and to appraise the value of the property, and assess the damages and to make a report to the county clerk. Appeal from the award of said commissioners might be taken to the district court. A drainage district having filed its petition for the appointment of commissioners, removal of the proceeding was had to the federal court upon a proper petition and bond therefor. The state court having denied the petition for removal, the plaintiff filed a bill in the

federal court for an injunction, to restrain the drainage district and the commissioners appointed. The court said:

While it is true that the state may not deprive the federal courts of its jurisdiction to determine matters of a judicial nature which are within the federal judiciary act, it by no means follows that, in all instances, the proceedings to take private property for public use, which are prescribed by the sovereign power of the state, *must be from the inception judicial.*

It was held that the proceedings taken by the commissioners were preliminary in nature, and not a suit, and not removable.

That a proceeding, to be a suit and removable, must be one in a court of justice, is well established, for it was said in *Weston v. City Council*, 2 Peters, 449, 464:

The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.

In the case of *Upshur Co. v. Rich*, 135 U. S. 467, 477, it was held that a proceeding not in a court of justice, but carried on by administrative officers in the exercise of their proper functions, and administrative in character, was not a suit, and appeal to a board having only *quasi* judicial powers was not a suit, "but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."

The removal statute provides that the suit or action removable shall be one "pending" or "hereafter brought" in "any State court." The Supreme Court of Oregon has decided that the State Water Board is not a court of the State. By creating administrative officers and departments, with *quasi* judicial functions, there is no interference with the jurisdiction of federal tribunals.

In the case of *In Re Jarnecke Ditch*, 69 Fed. 161, certain landowners had filed a petition in the circuit court of the State for the organization of a drainage district. The court referred the petition to the commissioners of drainage of the county, who later filed a report in the circuit court of the State. Remonstrances having been filed to said report, certain of the remonstrants filed petitions and bonds for a removal to the federal court. The commission provided for by the act was required to determine the public utility of the drain, extent of the assessment district, benefits and injuries. The federal court said, upon application to it for leave to file the transcript from the State court:

A state legislature, if the constitution of the state does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity.

It was also stated that it was a trial:

If conducted by a tribunal having power to determine the questions of law and fact; and if the subject matter constituted a controversy involving the legal or equitable rights of the parties, it might be cognizable in the courts of the United States. (P. 163.)

It was further said on page 164:

It is clear that the proceedings had by and before the Drainage Commissioners do not constitute a controversy of a civil nature at law or in equity. When the report is filed in court, it becomes a complaint, to which remonstrances may be addressed in the nature of pleas in bar, which will give rise to controversies which may result in defeating or modifying the report. The report states a cause of action against each landowner named therein. * * * The questions of taking the lands of the remonstrants for the construction of a drain, and the amounts of benefits which his land will receive therefrom, are to be heard and decided by the state court as other suits are tried and decided; and either party, if aggrieved, may have an appeal from such judgment to the Supreme Court.

In Black's *Dillon on Removal of Causes*, at page 28, Sec. 19, as to causes removable, it is said:

But in either case, the requirement of the statute is there should be a "suit of a civil nature at law or in equity," involving a "controversy" and pending in a "state court." And first, a suit implies a proceeding in a court of justice, between adverse parties, requiring judicial action for the determination of disputed rights. * * * Secondly, it is necessary that there should be a "controversy." Thirdly, the suit must have been brought in a "court" of the state. This makes it necessary, sometimes, to distinguish between courts, properly so called, and administrative officers, charged with *quasi* judicial duties.

After the State Water Board makes its findings and order, and files the same with the circuit court, we have no doubt that the proceeding becomes judicial in character, and (if otherwise it were removable) the same might then be removed. As was said in *In Re Jarnecke Ditch*, 69 Fed. 161, 167:

From the time the report is filed in the state court, the proceeding becomes, in my opinion, a suit between the petitioners on the one side and all others who are made parties thereto by the report on the other side. As to such parties who do not remonstrate the report will be confirmed, * * * etc.

This was the view taken by the court relative to this proceeding in *In Re Silvies River*, 199 Fed. 495, 502, the court saying:

After the evidence and determination of the Board has been filed with the court, the proceeding probably becomes a suit or action, but until the Board has completed its examination, made its determination and filed its report, the proceedings are purely administrative.

Such, also, is the express declaration of the statute, which provides (Sec. 25, p. 13, appellant's Brief) that:

From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity * * *.

And the statute is thus construed in *In Re Willow Creek*, 74 Ore. 592, 611:

It is only when the courts of the state have obtained jurisdiction of the subject matter and of the persons interested and rendered a decree in the matter determining such rights, that, strictly speaking, an adjudication or final determination is made.

In *Waho-Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.*, 158 Fed. 137, the statutes of Idaho provided that one desiring to acquire a right to water from a stream must apply to the State Engineer for a permit. If the holder of such permit does not complete a certain part of the construction work of the diverting works within a certain time limit, any person holding a permit subsequently issued may petition the State Engineer to cancel the prior permit. Such petition is required to set forth certain facts, and on receipt thereof the State Engineer must make an examination of the works in question, and if the required construction work has not been done, he is authorized to cancel the permit and notify the holder thereof, stating the reason for cancellation. If he refuses to cancel the permit, he must likewise notify the petitioner of such refusal. Either party may appeal to the district court of the State. No provision was made for pleadings in the district court after an appeal, and the procedure was not specified. A proceeding having been instituted before the State Engineer to secure the cancellation of a permit, the permit was cancelled by that official, and the permit holder appealed to the State court. The petitioner for such cancellation, being an Oregon corporation, removed the proceedings, after such appeal, to the United States District Court. The court said:

The proceedings prescribed by the Idaho statutes to be taken before and by the State Engineer are essentially non-judicial in their character, and are purely administrative, and in no sense do they constitute a suit at law or in equity. * * * While the questions of fact and of law to be found and determined in a case like that at bar are different in detail from those involved in the ordinary water case, still the matter in controversy is essentially the same. It is a property right, of a certain value if the earlier licensee's rights have lapsed, and of a radically different value, or of no value, if such rights are still in force. And hence a property right capable of pecuniary estimation is clearly involved.

The State Engineer's proceedings are *ex parte*, and are neither in form nor substance judicial in their nature. (P. 143.)

But it was held that, after an appeal had been taken, the case became a suit or controversy and removable.

It will be noted from an examination of the bill of complaint that at the time the removal to the federal court was attempted, and when the proceeding was remanded to the State Board, there was only a petition for adjudication and an order of the Board directing the Superintendent to notify claimants forming the record of the proceeding. The appellant had in fact submitted no proof of its rights, and taken no steps to comply with the requirements of the act other than such appearance as was necessary to secure a removal. No contests had been filed, either by or against appellant, and the hearing ordered to be held was solely for the purpose of receiving the affidavits or statements prescribed by Sections 14 and 15 (p. 8, appellant's Brief) and such testimony or other evidence as the several claimants might offer. These primary hearings are *ex parte* in their nature. Each claimant is entitled to submit such evidence as he sees fit. No provision for cross examination or objection thereto at this time is made. Later, under Section 19, an interested party may contest or object to such evidence, after having been afforded the opportunity to inspect it as prescribed by Section 18 (p. 9, appellant's Brief). Until these contests are filed, the proceeding is entirely *ex parte* in character.

Now, the petition for adjudication (Sec. 11, p. 6, appellant's Brief) is not a complaint or similar instrument. It can be likened only to a petition to secure the organization of an irrigation district (as in *Fallbrook v. Bradley*, 164 U. S. 112) or a drainage district (as in *In Re Jarnecke Ditch*, *supra*), or where street improvements are to be made for the benefit of the inhabitants of the improvement district. In Wyoming, no petition for adjudication is required, but the Board acts of its own motion. (*Farm Inv. Co. v. Carpenter*, 9 Wyo. 110.) Under the Oregon statute, the petition is only a request that the Board make the desired order. The Board cannot proceed without it. Such is the case in the organization of an irrigation district. But the Board has a

discretion as to whether it will act at all or not, and may refuse the request of the petitioners. It is provided in Section 11: "It shall be the duty of the Board of Control; if, upon investigation, they find the facts and conditions such as to justify, to make a determination," etc.

It is quite evident that the petitioners do not assume the role of plaintiffs: *First*, because the petition is not granted as a matter of right, but is a mere request for action, to be granted or not in the discretion of the Board; *second*, because no relief is asked, nor afforded by the statute, against any particular claimant; *third*, there are no defendants and the rights of petitioners are not assumed to be adverse to those of any other claimants. Indeed, the petitioners themselves might have adverse interests, which later might be made the subject of contest. One of the petitioners could as well be designated a defendant as the appellant.

On page 71 of appellant's Brief much stress is laid upon that section which provides for the determination of the Board, and it is contended that this authorizes a final determination, and hence the proceeding before the Board is judicial. The statute particularly expresses the intent of the Legislature in this respect, for it reads:

The determination of the Board of Control as confirmed or modified by this act in proceedings shall be conclusive, * * * etc. (Sec. 33.)

The language is unmistakable. Without referring to any other section, it is plain that further action is necessary, and that the determination of the Board cannot be final. Nothing can be final when some condition of finality still remains to be performed. One reading this section would at once examine other sections of the same act to ascertain what proceedings were necessary for modification or confirmation. Section 26 (p. 13, appellant's Brief, or as amended and set forth in a preceding part of this Brief) provides for the only final determination which may be made.

The whole matter is well settled in the case of *In Re Willow Creek*, 74 Ore. 592, which we have already referred to. It was there plainly held that the determination of the Board was not final and was only *prima facie* binding.

We do not doubt, however, the power of the Legislature (if conformable to the State Constitution) to provide that

the determination of an administrative board, for administrative purposes, shall be final. This was settled in the case of *Reetz v. Michigan*, 188 U. S. 505, 507. It was there said:

The decision of the State Supreme Court is conclusive that the act does not conflict with the State Constitution and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question.

We think, therefore, that, as an administrative proceeding before the Board, and one which was not brought or pending in a state court, the proceeding was not removable.

(B) If it be admitted that the proceeding is judicial in character, and in a court, and a suit, it was not removable because there was no separable controversy.

In *Waha-Lewiston L. & W. Co. v. Lewiston-Sweetwater I. Co.*, 158 Fed. 137, 143, it was said:

By reason of the prevailing principle that priority of appropriation confers superiority of right, each claimant to the waters of a stream, the amount of which is not sufficient to satisfy all claims, as is not infrequently the case, is directly and vitally interested not only in establishing the validity of his own claim, but in having it determined that other claims are either invalid, or are subsequent, for his own claim would be rendered worthless, even though valid, should all the water of the stream be required to satisfy other prior claims.

Appellant attempts to single out and segregate from among the two hundred claimants the half dozen petitioners for adjudication, and by the allegations in the petition for removal, in the nature of a complaint, setting up a separate cause of suit between it and such petitioners, to inject into the petition for adjudication a separate controversy. That the allegations of the petition for adjudication cannot be aided in this manner is well settled, as we shall presently show.

The necessity for the presence of all claimants to a general adjudication of water rights is well illustrated in the

case of *Hough v. Porter*, 51 Ore. 318, and particularly on pages 370 and 371, which we have quoted in a preceding section of this Brief, and on pages 440 and 441, where the question is again considered. In a proceeding of this character there can be no separable controversy between the appellants and the petitioners. In discussing this feature of the case, the court, on motion to remand (199 Fed. 495, 502) said:

Again a suit or action is not removable unless the controversy is one "wholly between citizens of different states which can be fully determined as between them." The settled rule of construction of this provision is that the whole subject matter of the suit must be capable of being fully determined as between citizens of different states, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit. (*Fraser v. Jennison*, 106 U. S. 191; *Hyde v. Ruble*, 104 U. S. 407.) The proceeding in question, in my opinion, is not of this character. Its purpose is to have determined the rights of all the claimants to the waters of Silvies River. The controversy is not alone between the parties who invoked the powers of the Board and the Live Stock Company, nor can it be decided without the presence of the other claimants. The water is the *res* or subject matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested not only in establishing the validity and extent of his own claim but in having determined all of the other claims. The proceeding is essentially a suit for the partition of the waters of the stream among the respective owners, and as such is not removable to this court. (*Torrence v. Shedd*, 144 U. S. 527.) It is not analogous to a suit to determine an adverse claim to real estate or to remove a cloud therefrom. It is a case where divers and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective and comprehensive proceeding, and is not a separable controversy between different claimants. It seems to me, therefore, the motion to remand is well taken on the ground that the proceeding at the time the petition for removal was filed was not an action at law or suit in equity within the meaning of the stat-

ute, and the controversy is not wholly between the petitioners and the Live Stock Company and is therefore not separable.

It was said in *Fraser v. Jennison*, 106 U. S. 191, 194:

To entitle a party to removal under the second clause of the second section of the act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of the controversy citizens of different states from those on the other. * * * To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.

In the case of *In Re Jarnecke Ditch*, 69 Fed 161, 168, 169, the court said:

The petition for removal and the report filed in in the state court, and the relief sought for thereunder do not present a controversy which is wholly between citizens of different states, nor one which can be finally determined between the petitioners for the drain and the parties seeking a removal without the presence of other parties whose interests are directly involved in the controversy. The original petition and the report do not present several causes of action, some of which are against the resident defendants and others against the non-resident defendants, but embrace a single cause of action and a single ground of relief. * * * it cannot be properly said the whole subject matter of the proceeding is capable of being fully and finally determined between the original petitioners on the one side and these four remonstrants on the other side, without the presence of other parties who have a direct and immediate interest in all the questions in controversy except that relating to the assessment of benefits on the lands of the remonstrants.

In the case of *Torrence v. Shedd*, 144 U. S. 527, a bill in equity was filed in the state courts of Illinois by the claimant

to an undivided one-third of certain lands, for partition of the land among the owners, about ninety owners being named as defendants. It was sought to remove the proceedings to the federal court. The court (Mr. Justice Gray) said, p. 530:

But in order to justify such removal on the ground of a separate controversy between the citizens of different states, there must, *by the very terms of the statute*, be a controversy "which can be fully determined as between them;" and by the settled construction of this section, the whole subject matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

And at page 532, it was said:

The present suit was a bill for partition of lands in Illinois, the principal object of which was to assign to all the tenants in common their shares in severalty. By the law of Illinois, indeed, the court might, in the suit for partition, determine all questions of conflicting or controverted titles, to the whole land, or to any share thereof. *But the determination of such questions of title was incidental to the main object of the suit*, and in order to do complete justice between all the parties, and avoid further litigation * * *. The object of the suit was not merely the establishment of the title of the plaintiff in an undivided share of the land; but it was the partition of the *whole land*, and the conversion of his undivided share into an entire estate in a proportional part, as well as the establishment of his title against all the defendants. * * * The inevitable result is that the controversy of the plaintiff and Brown with Sorin was merely incidental to the main object of the suit, could not be determined as between them without the presence of other defendants, and did not constitute such a separate controversy as would justify a removal into the Circuit Court of the United States.

And in *Ayres v. Wiswall*, 112 U. S. 187, 193, it was said:

The personal decree which is asked against Wiswall is incident to the main purpose of the suit. It presents no separate cause of action. The fact that

separate answers were filed which raised separate issues in defending against the one cause of action, does not create separate controversies within the meaning of that term as used in the statute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought.

And in *Fidelity Insurance Co. v. Huntington*, 117 U. S. 280, 281 :

Each of the defendants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies within the meaning of the removal act.

In the case of *M'Mullen v. Halleck Cattle Co.*, 193 Fed. 282, 283, it was said :

The complaint contains no allegations which in any manner indicate the Halleck Cattle Company's use or appropriation of the waters of the creek, or its claim of title thereto, is in any way connected with the use, claim or appropriation of any other defendant or defendants, except that each defendant is interested in the same stream, the waters of which are insufficient to answer the aggregate demands of all.

It was held that in a suit to quiet the title of the plaintiff there was a separable controversy, on the theory that a separate and distinct suit might have been brought.

This is a very different case from that presented in the case of *M'Mullen v. Halleck Cattle Co.*, *supra*. In this proceeding we have a petition requesting a determination of the "relative rights" of all claimants, not only as between petitioners and appellant, but as among petitioners themselves, and as between petitioners and other claimants than appellants.

This proceeding is not a suit to quiet title. Petitioners may have no title whatever, and may claim none. The statute requires only that they be water users. They may be using water as patrons of a public service corporation, or as lessees, or as mere trespassers or licensees. The proceeding is not to establish and quiet any title petitioners may

have. The object is a determination of all rights, so that a proper distribution of the water may be made. The petition is solely for the purpose of having the State, through an administrative board, start in motion proceedings to have judicially determined by the courts the relative rights of the various claimants and the residuum of interest which the State or public have in unappropriated waters. It is a request that the State assume charge of a stream system, and exercise the police powers of the State, which it has to supervise and control the use of one of the natural resources of the State, which many are claiming in common.

The *res* or subject matter is clearly all the water of the stream and not the quantity petitioners or the appellant or both are entitled to. Of course, there is no controversy, separable or otherwise. The petition does not present a controversy, whatever ulterior motives the petitioners may have had. There is no more controversy in this case than where landowners petition for street improvements, a drainage district or an irrigation district. There is an entire absence of controversy. No adverse rights are mentioned or involved. It simply starts in motion a statute. It does not prevent the bringing of the suits referred to, in the circuit court. It is not intended to replace suits for injunction or damages, or to quiet title to property. It does not quiet title of petitioners to the water involved or in favor of one party as against another.

The contention is made that several suits may be brought in the same proceeding and yet not affect the right of removal. Here again the word "suit" is used. There may be several contests, true, but these are not suits in any sense. Again, it is entirely optional with the claimant whether a contest be brought or not *before the Board*. (*In Re North Powder*, 144 Pac. 489.) We have no doubt but that he may wait until the proceeding is filed in the circuit court, and until it becomes judicial in character. The federal court (*In Re Silvies River*) has said, then, the proceeding becomes judicial. But it is erroneous to say that the contests are distinct or separable from the proceeding. The whole proceeding includes such contests but the contests are so convoluted with the entire proceeding as to preclude any idea that a separable controversy exists. The determination would not be

complete without such contests and no provision is anywhere made for a determination of the contests or for findings therein. The order of determination relates to the entire proceeding and not to any contest. It determines the relative rights of all the claimants whether contested or not.

But it should be noted that when appellant sought to remove the proceeding, no contests had been filed or were pending. The record, then, consisted of the petition for adjudication and the order granting it.

It should also be noted that the bill of complaint alleges (p. 24, appellant's Brief) that it has, since the proceeding was remanded, "filed contests to all of said claims so filed as aforesaid," which includes (p. 23) all of the other claimants, over two hundred in number. This, itself, is plain evidence that no separable controversy exists as between appellant and the petitioners for adjudication, but that the presence of all claimants in one proceeding is necessary to a complete determination.

The purposes and objects to be accomplished by this proceeding are well stated in *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 134, 135:

The position maintained by counsel is that a determination of the priorities of the rights to the use of water involves solely a judicial inquiry into rights of property as between private parties, and that the jurisdiction to undertake such an investigation and adjudicate therein can be constitutionally lodged only in some court which is by article V of the Constitution vested with judicial powers. The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the Constitution to redress grievances and afford relief at law or in equity, under the ordinary and well known rules of procedure. A purely statutory proceeding is created to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the Board; a proceeding which is to result not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceedings is a settlement or adjustment of the priorities of appropriation of the public waters of the state, and is followed by the issuance of a certificate to

each appropriator showing his relative standing among other claimants, and the amount of water to which he is found to be entitled.

An excerpt from this opinion is quoted with approval in *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 371, and is set forth in a preceding section of this Brief.

In the same case it is said at another point (p. 147) :

In an earlier part of this opinion we had occasion to allude to some of the particulars wherein the statutory proceeding differs from an ordinary suit in the courts. Affirmative relief in favor of one party as against another is not its object. Adversary pleadings, as they are commonly employed and understood, are not involved. Indeed, in the strict sense, except in case of contest, it is doubtful if the various claimants can be regarded as adversaries. In many instances they are not adversary in fact. In the very nature of a priority right to the use of flowing water an appropriator is unable to identify specific water to which he is entitled, unless, indeed, his appropriation extends to all the water of the stream. Hence it is possible that a number of appropriators with diverse interests may be respectively entitled to the use of a portion of the water of the same stream, without having a conflict occur in the exercise of their several rights, owing to the volume of water in their common source of supply, or other natural conditions.

And at another point it is said (p. 150) :

The district court is, by the Constitution, vested with original jurisdiction both at law and in equity. The jurisdiction of equity to entertain suits for quieting title to the use of water is well settled. The legislature has not attempted to divest the courts of that jurisdiction, and we do not think it could successfully do so. Although in the statutory proceeding for the determination of water rights, the courts obtain jurisdiction only by way of appeal from the decisions of the Board of Control, all the ordinary remedies known to the law pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of

the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that in the absence of a previous determination by the Board, or the courts, of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain relief such as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after, as well as before, an adjudication by the Board. But the principle applies here as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume in an independent action, to determine anew the rights of the parties, as between themselves, which have been settled by the decree of the Board of Control; at least in the absence of fraud, or a showing of facts sufficient to vitiate a judgment.

It is clearly shown, we think, that any controversy which appellant may have with petitioners for adjudication, is entirely outside of this proceeding, and that the matters involved in the proceeding in question could not be determined without the presence of all claimants. The whole purpose and object of the proceeding would, of course, be defeated if such construction were placed upon these statutes. Keeping in mind the ultimate objects, a complete water right record, and a state control or supervision, it is obvious that the contention that there is a separable controversy presented by the petition for adjudication has, we submit, no merit.

(C) Whether the proceeding was removable or not at the time appellant attempted to remove it, can only be determined from the record in the State tribunal at the time of the application for removal, and not by the allegations contained in petition for removal, or subsequent proceedings had before the State Board.

The rule is thus stated in *Thomas v. Great Northern Ry. Co.*, 147 Fed. 83, 86:

The sole question, however, is whether the case was one properly removable from the state court as it stood in that court at the time when the petition was filed. That question is to be determined by the conditions of the pleadings and the record at the time of the application for removal, and not by the allegations of the petition or the subsequent proceed-

ings, which may be had in the circuit court. (Citing *Bornay v. Latham*, 103 U. S. 205; *Wilson v. Oswego Tp.*, 151 U. S. 56, 66.)

And in *Louisville, etc., Co. v. Wangelin*, 132 U. S. 599, 601, it is said:

* * * The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

In other words, the record itself must show affirmative jurisdiction to make the removal, and the facts necessary to show diversity of citizenship or a separable controversy may not be left to argument or inference.

Fife v. Lumber Underwriters, 204 Fed. 32.

In the case of *State v. Alleghany Oil Co.*, 85 Fed. 870, 872, it was said:

It is settled, however, that where the jurisdiction of the courts of the United States, whether original or by removal, depends upon the existence of a federal question, it must affirmatively appear from the allegations in the declaration or bill of complaint; and that no statement in the petition for removal, or in the answer or demurrer, can supply that want, under the existing acts of Congress.

In the case of *Corbin v. Van Brunt*, 105 U. S. 576, 577, a suit was brought by citizens of New York, in the courts of that state, against several defendants, some of whom were citizens of other states. It was said that:

There is neither in the complaint nor the answers any claim of separate right, either to the possession or the property.

The controversy was not removable because the pleadings presented no separate controversies, such as admitted of separate and distinct trials.

And *In Re Jarnecke Ditch*, 69 Fed. 161, 168, it was said:

The question whether there is a separable controversy authorizing its removal into this court must be determined by the state of the pleadings and the record at the time of the application for removal, and not by the allegations of the petition therefor, nor by the subsequent proceedings in the state court.

In determining whether a controversy is wholly between citizens of different states, and separable, the federal court has judicial discretion and for error in its conclusions that the *cause is removable* mandamus will not lie to perform the office of an appeal or writ of error. (*Ex parte Nebraska*, 209 U. S. 436, 441.)

Whether there was a separable controversy must be determined by the condition of the record in the state court, and the facts necessary to give jurisdiction must have appeared upon the petition or complaint of plaintiffs, and the petition for removal cannot supply same unless fraud be sufficiently and specifically averred and proved. (*Arkansas v. Kans. & Tex. Coal Co.*, 183 U. S. 185, 188; *Mountain View Co. v. McFaddin*, 180 U. S. 533; *Chicago B. & Q. R. Co. v. Willard*, 220 U. S. 413.)

In *Alabama Great So. Ry. v. Thompson*, 200 U. S. 206, 216, 218, it is said:

The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

And the plaintiff in the state court may select his own method of attack and whether there is a separable controversy or not is to be determined from his declaration, bill or complaint, if that is the only pleading. *Idem*.

The motives which the plaintiff may have had in bringing his suit are immaterial, if not fraudulent.

The cause of the action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. (*Powers v. Chesapeake & etc., Ry.*, 169 U. S. 92, 96, 97.)

The joinder of several parties defendant is not a fraudulent device to prevent a removal if it has "any reasonable basis." The joinder of the parties is the exercise of a lawful right, if the right to join them is present. (*Chesapeake & O. Ry. v. Cockrell*, 232 U. S. 146, 153.)

The allegations relative to the removal proceeding are to be found on pages 18 and 19 of appellant's Brief. The contents of the petition for adjudication are set forth on page 17. These allegations in the bill of complaint show that a petition had been filed which alleged that "the waters of said stream and its tributaries were claimed by various claimants and praying that a determination of the relative rights of the various claimants to the said waters of said stream and its tributaries be made by said State Board of Control." (P. 17, appellant's Brief.)

In the petition for removal (p. 19) appellant set up a cause of suit relative to their water rights against the petitioners, and apparently sought to inject these allegations into the petition for removal.

It follows from the cases cited that, the petition for adjudication being the only evidence before the Board and the entire record (with the order of the Board, directing all claimants to be notified), no controversy of any nature whatsoever is made to appear and particularly no controversy between the appellant and petitioners for adjudication, separable or otherwise. No allegations of a fraudulent joinder of defendants are made and nothing is claimed in that respect.

As the matter stood at the time a removal was sought, there were neither plaintiffs nor defendants, and no controversy apparent on the face of the record before the Board.

(D) The proceeding was not removable because the State is a necessary party to the proceeding.

In discussing the extent of the police powers of the State to control and regulate the use of its natural resources

we had occasion to refer to this matter somewhat in detail, and we refer to that part of our Brief in connection with this point.

In *Kansas v. Colorado*, 206 U. S. 46, 93, the court said:

It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

And at page 94, 206 U. S., it was said:

It (the state) may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any state.

See *Boquillas Cattle Co. v. Curtis*, 213 U. S. 339.

U. S. v. Rio Grande Irr. Co., 174 U. S. 690.

Gutierrez v. Albuquerque L. X. C. Co., 188 U. S. 545.

The right of the state to control and regulate those things in which a common property exists has been recognized, and for the purpose of protecting the common property and regulating and controlling it the state is considered as a representative of the people or common owners. This rule has been applied to natural gas and oil, in which a "coequal right" in all the landowners to take from the common source of supply a proportionate part thereof, exists. (*Ohio Oil Co. v. Indiana*, 177 U. S. 190.)

The same principle was applied in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, where natural mineral springs were involved. The statute there questioned was held to regulate the exercise of the common right of the several landowners so as reasonably to conserve the interests of all who possessed the right.

The case of *Hudson County v. McCarter*, 209 U. S. 349, 355 (28 Sup. Ct. Rep. 529), was quoted from in a preceding part of this Brief. In that case it was said:

It sometimes is difficult to fix the boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as *quasi* sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. * * *

* * * We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.

And it was therefore held that a riparian owner might be restrained from diverting the waters of the stream passing his lands into another state, in a proceeding by or on behalf of the state, without in any way violating the provisions of the Fourteenth Amendment.

Section 6675, Lord's Oregon Laws (Gen. Laws of Oregon for 1909, Chap. 221, p. 370, Sec. 1) declares:

All water within the State from all sources of water supply belong to the public.

In the case of *Hough v. Porter*, 51 Ore. 318, it was held that by the terms of the desert land act of March 3, 1877, there was a reservation or dedication to the public for irrigation, and other beneficial uses enumerated in that act, of all the riparian rights and interest of the federal government held at that time in the waters flowing wholly or partly through the public land of the United States, and a consequent abrogation of the common law rule of riparian rights as to all lands patented subsequent to that act. This decision was foreshadowed by *Williams v. Altnow*, 51 Ore. 275, and has been followed in *Hedges v. Riddle*, 63 Ore. 257, and *Pacific Live Stock Co. v. Davis*, 60 Ore. 258. Section 11 of the act here involved provides that the State Water Board shall institute proceedings for the determination of water rights "if upon investigation, they find the facts and conditions such as to justify." Upon final determination the Board issues a water right certificate (Sec.

25) to each claimant. Under the provisions of Sections 45, 46, 47, 48, 49, 50 and 51, those desiring to initiate rights to water are required to secure permits therefor from the State Engineer.

By the provisions of Section 26, as amended by Laws of Oregon for 1913, page 161, at the time of the hearing in the circuit court, after the Board has filed its findings and the proceeding has become a suit in equity,

all parties may be heard upon the consideration of exceptions, and the *Board of Control* may appear on behalf of the State of Oregon, either by a member of such Board or by the Attorney General.

Section 9 of the act provides:

The State Engineer and the Superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith * * *

We contend that this proceeding is one instituted by the State itself, upon the request of the water users, to have judicially determined the rights of all claimants to the waters of a stream system, for purposes of police regulation, to prevent further litigation, provide a complete, public record of water titles, and thereby protect one of the most important natural resources within the State. And we submit that a state has a standing in court, as decided in *Hudson Water Co. v. McCarter, supra*, to protect its natural resources, and to secure the proper exercise of its police powers.

We further contend that for the purpose of protecting vested rights to the waters within the state, prevent monopoly thereof, and encourage the extended use of those waters, these police regulations, including adjudication proceedings, are, in this western region, some of the most important duties resting upon the state, and consonant with sound public policy.

There can hardly be any doubt but that this proceeding is initiated by and on behalf of the state itself. Its purpose

is not to afford any remedy to petitioners, nor to establish alone their titles, but to protect all users and owners of vested rights and secure them in the enjoyment of those rights, and have determined the residuum of water, if any, which may be left for future use over an extended area of agricultural land.

The court, in *In Re Silvies River*, 199 Fed. 495, 503, in discussing this feature on motion to remand these proceedings, said:

I am also impressed with the soundness of the view that a proceeding for the adjudication and determination of the rights to the use of the waters within the State, instituted and conducted as provided in the legislative act of 1909, is in effect a proceeding on behalf of the State through an administrative or executive board to have judicially settled in an economical and practical way the rights of various claimants to the use of the waters of a stream or source of supply, and thus avoid the uncertainty as to water titles and the long and vexatious controversies concerning the same which have heretofore greatly retarded the material development of the State. If it is an action by a State, no removal can be had into this court on the ground of diversity of citizenship, because the State is not a citizen within the meaning of the removal statute. (*State of Indiana v. Alleghany Oil Co.*, 85 Fed. 871, and authorities cited.)

It was said in *Ohio Oil Co. v. Indiana*, 177 U. S. 190:

Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession and to reach the like end by preventing waste. * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law * * * which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.

In determining whether the state is a necessary party to these proceedings, the court will look into the nature of the proceeding, and, if the state is a real party in interest, it will so declare, although not named as a party.

In the case of *Ex parte Nebraska*, 209 U. S. 436, 445, it was said:

The question whether the State of Nebraska is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record. If the nature of the case is such that the State of Nebraska is the real party plaintiff, the federal court will so decide for all purposes of jurisdiction, even though the State was not named as a party plaintiff. If the nature of the case is such that the State is not a real party plaintiff, the federal court will so decide for the purposes of jurisdiction, even though the State is named nominally as a party plaintiff.

In the case of *State of Indiana v. Alleghany Oil Co.*, 85 Fed. 870, it was said:

When a State brings a suit in a court of its own creation against a citizen of another State, no removal can be had into a circuit court of the United States on the ground of the diverse citizenship of the parties. A State is not a citizen of any State, and, under the judiciary acts of the United States, it is firmly settled that a suit between a State and a citizen or corporation of another State is not between citizens of different States; and that the circuit courts of the United States have no jurisdiction of it unless it arises under the constitution, laws, or treaties of the United States.

In *In Re Willow Creek*, 74 Ore. 592, 613, it is said:

Unless the suit is first commenced in court and the cause referred to the Board under Section 6635, Lord's Oregon Laws, the proceedings before the Board are not initiated by the filing of a complaint or pleading setting up the rights claimed. A mere request is made by one or more water users upon the stream. The Board is required to make an investigation to ascertain whether or not the conditions justify proceeding. In order to obtain injunctive relief or to exercise the right of eminent domain, resort must be had to the courts.

And on page 610 it is held that the statutes are an exercise of the police power of the State to provide a complete system of state control and a record of water right titles somewhat similar to land titles.

And at page 614 it is said:

By proceeding in accordance with the statute, when the matter is presented to the court for judicial action, it is in intelligible form. *The Water Board and State* may then be represented by counsel.

It is plain from a reading of the statute in the instant case, that the State Water Board is a governmental agency, to which power has been delegated to gather data and information relative to the rights to the use of the waters of a stream which is the subject of a determination, and report the same to the circuit court, in the form of findings and a preliminary determination of the rights, for an adjudication of the rights in that court. The State itself is making these water right investigations, for the purpose of assuming a public control of the diversion and use of the water, by a valid exercise of its police powers, through its regularly appointed agents, and we submit that the case is within the rule laid down in *Ferguson Shore Inspector v. Ross*, 38 Fed. 161, and in *Indiana v. Alleghany Oil Co.*, 85 Fed. 870. In the latter case the court said:

It is a suit by the State to enforce an important governmental policy. The policy to be subserved is the loss from waste of the natural gas and oil underlying a large portion of the State. Its protection concerns the public and some private rights. It concerns the welfare of the whole State.

As in this case, the State of Indiana sought to protect its natural resources from waste by providing suitable regulation, so the State of Oregon in the passage of the Water Code has provided for the determination by the State, in an economical manner, of all rights to the use of the waters of the State, in order that the State's administrative machinery may be applied to the distribution of the waters of the natural streams. The waters of the State are one of its most valuable natural resources, which the Legislature of the State has declared belong to the public so far as

unappropriated or not already the subject of vested rights. Not only is the State interested in the distribution of water and the prevention of waste, but the State is also interested in the determination of the amount of unappropriated water in the various streams of the State, in order that the extent of the unappropriated waters may be known, to enable those who so desire to apply them to a beneficial use. Until a determination of the existing rights of the waters of a stream has been made, it is impossible to ascertain the amount of water available for additional uses. The State, in cooperation with the federal government, is expending large sums of money annually in determining the discharge of natural streams within the State, and in the compilation of records thereof, for the use of the public. While beneficial to the private parties, owning vested rights, these proceedings are further of great benefit to the State and the public generally, and the determinations thus made will serve, with the state and federal investigations of the water resources of the State, as a basis for future improvement of the vast area of arid lands, upon the development of which the prosperity of the State is largely dependent.

The suit now before the court is in effect a suit brought by a citizen of California, the Pacific Live Stock Company, against the State of Oregon, to restrain the State, through an authorized department of the State government, from exercising those powers and performing those duties conferred upon it by the Legislature of the State, in furtherance of the announced public policy of the State and to protect the natural resources of the State. The effect of the restraining order demanded by the appellant would be to deprive the State of Oregon of the privilege of determining not only the existing vested rights to the waters of Silvies River, but also of determining the quantity of unappropriated water remaining in the stream, if any, subject to further appropriation and use.

VI.

THE DEFENDANTS, OTHER THAN THE MEMBERS OF THE STATE WATER BOARD, WHO WERE PARTIES TO CERTAIN SUITS BROUGHT BY APPELLANT IN THE FEDERAL COURT, SHOULD NOT BE ENJOINED FROM PROTECTING THEIR RIGHTS BEFORE THE STATE BOARD AND STATE COURT IN THESE PROCEEDINGS, BECAUSE OF THESE PRIOR SUITS IN THE FEDERAL COURT.

It is appellant's position, as we understand it, that the defendants (The William Hanley Co., Silvies River Irr. Co., and Harney Valley Imp. Co.) in certain suits instituted in the federal courts prior to these proceedings, should be enjoined from taking any steps to protect their rights before the Board. On pages 36 and 37 (paragraph II) of appellant's Brief, it is admitted that in the event that this is a judicial proceeding, the members of the Board are not proper parties to a suit to enjoin the alleged interference with the prior jurisdiction of the federal court.

In stating the contention of the appellant (paragraph II, p. 36, appellant's Brief), it is assumed that these defendants are "prosecuting the proceeding," and thereby interfering with the prior jurisdiction of the federal court. This contention requires a statement of the position these defendants occupy in the proceedings. It is obvious that they are not in any sense prosecuting the proceedings, but are made parties to it, without their consent, and perhaps even against their will. These defendants were not the petitioners for the adjudication, and are not in any sense the moving parties in the proceedings. They occupy exactly the same position as the appellant, having been notified to appear and offer proof in behalf of their respective rights.

It is essential to an understanding of the position assumed by appellees, the members of the State Board, to state briefly the effect of these proceedings upon the defendants, other than the members of the Board, who have been joined upon the theory that they are "prosecuting" the proceedings before the Board.

We contend (and we think that this is borne out by the authorities cited and quoted from at other parts of this Brief) that these proceedings are instituted and prosecuted by and on behalf of the State of Oregon, under its police powers, and that neither the petitioners for adjudication nor the other claimants, are in any sense the moving parties, nor can they be said to be "prosecuting" the proceedings. As to them, the proceedings are entirely *in invitum*. All claimants are required to appear, who are served with notice. The petition is merely a request, and not a complaint. The institution of the proceedings rests in the discretion of a State Board. (Sec. 11, p. 7, appellant's Brief.) (*In Re Willow Creek*, 74 Ore. 592.)

The notice to claimants (Sec. 12) by publication, is prepared and published by the State Board. The notice by registered mail (Sec. 13) is sent by the Division Superintendent, a member of the Board. Each claimant (Sec. 14) is required to submit proof to the Board, and set forth those certain particulars "necessary for the determination of his right."

All of the evidence taken at the *ex parte* hearings are thereafter opened to public inspection, notice of which is given by the Superintendent. (Sec. 18.)

Thereafter, within a certain time limit, any person interested in the stream, desiring to contest the rights claimed by any other claimant, may do so by filing a notice of contest with the Superintendent; or he may wait until the findings of the Board are filed in the circuit court, and do so by taking exceptions, as he does not waive his right to contest or object to another's claim by failing to file a contest notice before the Board. (*In Re North Powder*, 75 Ore. 83.) Notice of the hearings of the contest are given by the Division Superintendent (Sec. 20). Finally the Board prepares findings of fact and an order of determination, which is not final, but *prima facie* correct and binding, until modified in subsequent proceedings in the circuit court. These findings are filed in the circuit court, after which the proceedings had are "as nearly as may be like those in a suit in equity" in that court.

Any claimant may file exceptions, and may thereby raise any question or present any contest which he might

have presented before the Board, although he filed no contest before the Board. (*In Re North Powder, supra.*) Such further testimony as may be necessary may be taken, and the proceeding may be remanded for that purpose to the Board, which may also be required to make a further determination. The State of Oregon is represented at the hearings in the circuit court by an authorized representative. (*In Re Willow Creek, supra.*)

It is obvious that these proceedings are instituted on behalf of the State and that the State itself is the moving party and occupies the position of a plaintiff. All parties are required to appear, and their appearance, in answer to a notice, cannot be construed to mean that they are in any sense prosecuting the proceeding.

The suits brought by appellant were instituted for the purpose of enjoining a threatened interference with its rights and involved only a few of the many claimants, and only a part of the waters of the stream in question. The case of *Pacific Live Stock Co. v. Silvies River Irr. Co.* was a suit in equity brought by the appellant against certain defendants. The bill of complaint therein alleged the ownership by appellant of a large tract of riparian land and it was stated (200 Fed. 487) that the "sole question between parties" to the cause was whether there are surplus waters of the Silvies River during the times of high water, and, if so, whether the appellees have the right to divert them for the purpose of irrigating land not riparian to the stream.

The district court was of the opinion that:

As between the appellant and the appellees certainly the river carried some surplus water during its high stages which should be left to future ascertainment.

The Circuit Court of Appeals held:

That being so and the laws of the State of Oregon in force at the time of the decree appealed from recognizing the rights of riparian proprietors to a limited extent only, and providing for the right of the appropriation of water of the non-irrigable streams of the State for beneficial uses, we are of opinion that the decree here in question should be reversed and the cause remanded for further proceedings in accordance with those laws.

After stating that "the latest state statute upon the subject, referred to as the Water Code, was enacted February 24, 1909," and after considering the several provisions of that statute, this disposition of the case was made by the Circuit Court of Appeals at page 493, 200 Fed.:

The judgment is reversed and the cause remanded, with directions to allow the parties a reasonable time to take proceedings under the above-mentioned statute of the State of Oregon and in the event they do not proceed thereunder within a reasonable time to require all parties in interest to interplead herein, and then to proceed to a determination of the issues between them in accordance with the laws of the said State.

It is quite evident that the district court was not in a position to grant an injunction staying proceedings before the State Board, because of this suit, after this disposition of the suit by the court of appeals.

The case of *Pacific Live Stock Co. v. Hanley*, 200 Fed. 468, was instituted by a supplemental bill in equity by appellant to obtain a construction of a prior decree between the parties, and to aid in the enforcement of such decree. See 98 Fed. 327.

The Federal District Court disposed of the contention of appellant with respect to these prior suits with the following statement (217 Fed. 95, 97):

Nor is there any doubt of the authority of a court of the United States to grant an injunction to stay proceedings in a state court to protect its own prior jurisdiction. (*Cen. Trust Co. v. Western N. C. R. Co.*, 112 Fed. 471.) But no such necessity exists here. The matters involved in the two proceedings are essentially different. That before the State Board is to ascertain, determine and fix the relative rights of all the claimants, including the complainant, to the use of water from a common source, while the purpose of the suits pending in this court is to enjoin threatened interference by certain parties with the complainant's use of the water, and, in our judgment, is not a bar to the proceedings before the state tribunal, nor does it prevent the state authorities from ascertaining and determining the relative rights of the claimants as provided in the state law, whether their conclusions, if they come to issue here,

may or may not be binding on this court. (*Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Sperry & Hutchinson v. Tacoma*, 190 Fed. 682.) In one of the cases referred to the matter involved is now before the Water Board in pursuance thereof by direction of the Court of Appeals. (*Pacific L. Co. v. Silvies R. Irr. Co.*, 200 Fed. 487.)

The cases cited by appellant (p. 61, appellant's Brief) support a well recognized rule which has no application to the proceeding pending before the Board.

Such rule has no application to proceedings before an administrative board, where such proceedings are purely administrative. We have, we think, shown that these proceedings are at this time purely of that character.

But assuming that the argument made by appellant is correct, and these proceedings are judicial, many reasons suggest themselves why the injunction sought should not be granted.

We admit the familiar principle that, when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues until final disposition of the matter is made, and that no court of coordinate jurisdiction is at liberty to interfere with its action. One essential condition of the application of such rule is that the first suit shall afford the plaintiff in the second one adequate and complete opportunity for the adjudication of his rights.

But it is not true that after a court has obtained jurisdiction of a suit and the parties to it, involving a certain subject matter, all other courts are excluded thereby from adjudicating upon other matters having a very close connection with those before the first court and even requiring a determination of exactly the same questions.

In order to render the jurisdiction of the court having before it a prior suit, exclusive of the nature of the remedies, the character of the relief sought, and the identity of the parties in the several suits, should be ascertained.

In the case of *Watson v. Jones*, 13 Wall. 679, 715; 20 L. Ed. 666, 671, it was said:

In regard to the suit in the chancery court of Louisville, which the defendants allege to be pending, there can be no doubt but that that court is one com-

petent to entertain jurisdiction of all the matters set up in the present suit. As to these matters, and to the parties, it is a court of concurrent jurisdiction with the Circuit Court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by final judgment or decree. But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

And in the case of *Buck v. Colbath*, 3 Wall. 334, 345, the following statement is made:

But it is not true that a court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgages; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. * * * This is the illustration of the rule where the parties are the same in all

three of the courts. The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceedings are prosecuting their own separate interests in other courts.

It is quite evident that the suits brought by appellant in the federal court fail to measure up to these established requirements.

On page 64 of appellant's Brief, the argument is made that the district court distinguished these suits from the proceedings before the Board merely on the ground of the *form* of the proceeding. In *Buck v. Colbath*, *supra*, the court said (p. 345) :

In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the *nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits.*

Now, the proceedings before the Board (and subsequent proceedings before the court) have for their object three things, which are: First, a decree which is the basis for future division of the waters among those entitled thereto; second, a decree which may form the basis of a complete record of the titles to the waters of the stream involved; and, third, a decree which will permit a determination of the quantity of water unappropriated and available for future use. No remedy is afforded, as by injunction, and jurisdiction remains in the courts of the state to issue injunctions, quiet title, etc., as fully and completely as before. The court in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 135, correctly analyzes the nature of the proceeding, saying:

The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the Constitution to redress grievances and afford relief in law or in equity, under the ordinary and well known rules of procedure. A purely statutory proceeding is created to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the Board; a proceeding which is to result not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's

rights or privileges; but the finality of the proceedings is a settlement or adjustment of the priorities of appropriation of the public waters of the State, and is followed by the issuance of a certificate to each appropriator showing his relative standing among other claimants, and the amount of water to which he found to be entitled.

And at another point, it is said (p. 143) :

The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right, a right to use a peculiar public commodity. The evidence of title comes properly from an administrative board, which, for the State in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests.

And, concerning the position of the several claimants to a proceeding of this character, the same court said at another point (p. 147) :

In the earlier part of this opinion we had occasion to allude to some of the particulars wherein the statutory proceeding differs from an ordinary suit in the courts. Affirmative relief in favor of one party as against another is not its object. Adversary pleadings, as they are commonly employed and understood, are not involved. Indeed, in the strict sense, except in case of contest, it is doubtful if the various claimants can be regarded as adversaries. In many instances they are not adversary in fact. In the very nature of a priority of right to the use of flowing water an appropriator is unable to identify specific water to which he is entitled, unless, indeed, his appropriation extends to all the water of the stream. Hence it is possible that a number of appropriators with diverse interests may be respectively entitled to the use of a portion of the water of the same stream, without having a conflict occur in the exercise of their several rights, owing to the volume of water in their common source of supply, or other natural conditions.

And at another point it is said (p. 148) :

The proceeding before the Board is not a part of the process by which an individual appropriation is completed, for that occurs upon a lawful diversion of

water open to appropriation and its application to a beneficial use. But the proceeding is instituted by the Board, in an official capacity representing the public, for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective State control of the public waters. A part of the object is also public recognition of an appropriation previously made, and the issuance of documentary evidence of title.

And in *In Re Willow Creek*, 74 Ore. 592, 690, it is said :

It is evident that in the enactment of the Water Code, the State being interested in providing a system for the regulation of the use of the water and for the determination of existing rights thereby exercised the police power of the State in order to provide a complete system of State control, in the regulation of the diversion and use of the water, and a means for having a record made of the rights to the same, for much the same purpose as records of title to real estate are provided.

And at page 613, in the same case, it is further said :

Unless the suit is first commenced in court and the cause referred to the Board under Section 6635, Lord's Oregon Laws, the proceedings before the Board are not initiated by the filing of a complaint or pleading setting up the rights claimed. A mere request is made by one or more water users upon a stream. The Board is required to make an investigation to ascertain whether or not the conditions justify proceeding. In order to obtain injunctive relief or to exercise the right of eminent domain, resort must be had to the courts.

And at another point it is said (pp. 613-614) :

To accelerate the development of the State, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the State enacted the law of 1909, thereby to a limited extent calling into requisition its police power.

And in *In Re Silvies River*, 199 Fed. 495, 501, 502, the court said:

The powers of the Board are not brought into action by the filing of a paper in the nature of a complaint setting up asserted rights, but by the mere presentation to it of a petition or request by one or more users of the water without any allegations of issuable facts, other than that the petitioner is a water user on the stream and a request for the determination of the relative rights of the various claimants to such waters. No affirmative relief is asked and no adverse pleadings are required or permitted, or issues joined until after the evidence taken by the Board is open to the inspection of the various claimants and owners. After the filing of the petition, the proceedings are to be conducted by the Board and upon its initiative. Neither the petitioner nor the claimants obtain any redress for an injury as the result of such proceedings but merely evidence of their title or right to the use of the water.

And at another point, in the same case (p. 502), it is said:

The proceeding in question, in my opinion, is not of this character. Its purpose is to have determined the rights of all the claimants to the waters of Silvies River. The controversy is not alone between the parties who invoked the powers of the Board and the Live Stock Company, nor can it be decided without the presence of the other claimants. The water is the *res* or subject matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims. The proceeding is essentially a suit for the partition of the waters of the stream among the respective owners and as such it is not removable from this court. (*Torrence v. Shedd*, 144 U. S. 527.) It is not analogous to a suit to determine an adverse claim to real estate or to remove a cloud therefrom. It is a case where divers and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective and comprehensive proceeding, and is not a separable controversy between different claimants.

It is quite evident that the proceeding in question is of an entirely different character, and for entirely different purposes than those for which the suits in question were instituted. Indeed, the proceeding and the suits are not comparable. The object of those suits is remedial entirely, requiring only the presence of the immediate parties against whom relief is asked. The object of the present proceeding is the ascertainment of all the water titles, and the compilation of a complete title record, and in the absence of any interested parties this object cannot be attained. If appellant's contention were sustained, then it would follow that the entire object of the present proceeding would be entirely prevented and the suits in the federal court would not accomplish any part of this result. It would be impossible for the State to exercise its police powers to accomplish the control of this stream system, and doubtless that is the very object appellant has in pleading these suits in bar of the proceeding and seeking this injunction. The injurious results which would necessarily flow from such construction we need only refer to, as they are obvious.

It follows necessarily that if the appellant should obtain decrees or judgments in the suits in question, such decrees would not be a bar to the institution of these proceedings. Doubtless, such decrees would be of binding force upon the immediate parties or their successors in interest, and the Board would also be bound to recognize them, so far as they were *res adjudicata*. As was said in *Wattles v. Baker County*, 59 Ore. 255, 261:

The intent of the act seems to be to place the control of irrigating water under the jurisdiction of the Board of Control as rapidly as rights are determined by it, and become a matter of record in its office. When the Board convenes to determine such rights, prior decrees, made independent of action by the Board, are conclusive upon it as between the parties to such decrees, and thereafter the rights established thereby may be enforced by the Water Master, the same as though they had been originally determined by the Board. But, in the absence of such determination in accordance with the Water Code, such rights must be enforced by the court making the decree.

And in *Claypool v. O'Neill*, 65 Ore. 511, 512, 513, it was held:

The important question for considering is whether the decree in *O'Neill v. Corder et al.* is final and conclusive against Claypool and Sevey in this proceeding to the extent that O'Neill must be considered the owner of 100 miners' inches of water in the flow of the creek; defendant contending that the said decree gives Francis O'Neill absolute title to the 100 miners' inches of water regardless of his needs, while plaintiffs contest his right to more water than necessary for the irrigation of his land. The Board of Control evidently disregarded that decree in determining defendant's rights. It is provided in Section 6595, Lord's Oregon Laws, that the Board of Control cannot impair relative priorities to the use of water, among parties to any decree of the courts rendered in causes determined prior to the taking effect of the Water Code of 1909. The rule is that the decree of a court of general jurisdiction is unimpeachable in a collateral proceeding. (Lord's Oregon Laws, Sec. 756.) It is conclusive of every fact necessary to uphold it as to all matters actually determined, or that might have been determined, upon the issues made. (*White v. Ladd*, 41 Ore. 324; 68 Pac. 739, 93, Am. St. Rep. 732). The suit of *O'Neill v. Corder* was commenced for the purpose of establishing the rights of plaintiff, and to enjoin the defendants from interfering therewith. Defendants were served with summons and appeared by demurrer, which was overruled; and, the defendants having failed to answer, and Corder consenting in writing, a decree was rendered which is conclusive against the defendants therein of the matters decided.

But decrees rendered in prior suits are not binding on any but the parties to them and their successors in interest. In the proceedings in question, many controversies and issues may arise between the appellant and other claimants, and between other claimants than appellant, and these defendants. Without the presence of each and all of these claimants, regardless of prior suits, the object of the proceeding would be wholly prevented, and no substitute for such proceedings is offered by the suits in question.

It necessarily follows that any decree entered in the suits in the federal court would not prevent the subsequent insti-

tution of these proceedings before the Board, nor would a decree in these proceedings constitute a bar to the suits in the federal court.

The proceedings before the Board, and in the circuit court, are more nearly like those in a partition suit than any other suit with which they are comparable. For many years it has been customary to determine rights to water powers and water for power purposes, owned in common, by suits to partition the respective rights and interests into rights in severalty.

Cooper v. Cedar Rapids W. P. Co., 42 Iowa, 398.

Hanson v. Willard, 12 Me. 142.

Spensley v. Janesville, etc., Co., 62 Wis. 549.

The case of *Warren v. Westbrook Mfg. Co.*, '88 Me. 58; 35 L. R. A. 388, was a suit in equity for the partition of the waters of a certain river. It was said:

To make the water power of economic value the rights to its use, and the division of its use according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty, to leave one to encroach upon the other, to leave each to use as much as he can, and leave the other to sue at law after the injury, is to leave the whole subject matter to possible waste and destruction.

In *Roberts v. Claremont R. & L. Co.*, 74 N. H. 217, 220, it was said:

Although the owners of the land are not, strictly speaking, the owners of the water which flows in a natural channel over it, nor is the owner of either bank the owner of that part of the water which flows over his land, still the owners of the banks are the owners of the right to use the water for any lawful purposes—each owning an undivided one-half of that right. Consequently their rights and liabilities in respect to the use of the water are those of tenants in common in respect to common property.

The Supreme Court of Oregon, in the case of *Caviness v. La Grande Irr. Co.*, 63 Ore. 410, 421, defines the rights of the appropriator and riparian owner, as follows:

In other words, a riparian owner, using water in that capacity, is in a sense always a tenant in common with other riparian owners on the same stream whose rights, at least for irrigation, he is bound not materially to injure by his riparian use of the water. The appropriator, however, is always a tenant in severalty owing no duty or respect to those endeavoring to use the water by title subsequent to his own.

The inability of the courts in ordinary equity suits, to partition out the rights of riparian owners, is referred to in *Caviness v. La Grande Irr. Co.*, *supra*, the court, on page 422, saying:

The reason is that among riparian owners the contingencies of the future are so many and varied, respecting the amount of rain or snow fall, the heat or humidity of summer, the alternation of crops, and the like, that it is quite impracticable, if not impossible, to determine in advance the question of the duty of water for each riparian owner. Besides, a decree of that kind would be a virtual partition of the water from an estate in common to one in severalty, although there would be no rule whereby the estate of any single owner could be determined, owing to the unknown factors already noticed.

The court, in this statement, had in mind the case of *Jones v. Conn.*, 39 Ore. 30, 37, where the court, although unable under the pleadings in that case to afford such relief, said:

For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may in a proper case apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such manner as may seem equitable and just under the circumstances. (*Harris v. Harrison*, 93 Cal. 676, 680, 29 Pac. 326; *Wiggins v. Muscupiabe Water Co.*, 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725.)

The cases cited by the court clearly hold that riparian rights may be determined and the waters apportioned accordingly, in a proper case.

The provisions of the Oregon Water Code require the determination of all claims to the water, whether riparian or based on appropriation. In the case of *In Re Willow Creek*, 74 Ore. 592, 622 *et seq.*, the doctrine of riparian rights as it is recognized in Oregon was fully considered. It was held that (p. 623) :

This rule prevails in the State of Oregon only to a limited extent.

On pages 625, 626, the court said :

A riparian proprietor cannot lay claim to the undiminished flow of a stream without actual use simply because it adds beauty to the outlook. (4 *Kinney, Irr.*, Sec. 1975.) A riparian owner's right to water for irrigation is limited to the amount of water needed and used, so that, to determine that fact, the amount of land irrigated, the character of the soil, and the amount of water needed per acre must be known. (*Hedges v. Riddle*, 63 Ore. 257, 127 Pac. 548).

And on pages 627, 628, the court further said :

In the arid and semi-arid lands of the West the early home builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws then prevailing and defining the appurtenances thereto.

When such rights have become vested, they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation. In this proceeding the Eastern Oregon Land Company should be awarded no additional use of water, not having shown that it has ever applied to a beneficial purpose any of the water of such stream in excess of the amounts above specified, or that it desired or intended to do so, and not having shown what part of its other land is susceptible of irrigation. (Section 6595, subd. 2, Lord's Oregon Laws.)

Section 6595, Lord's Oregon Laws (a part of the Water Code) provides in part:

Actual application of water to beneficial use prior to the passage of this act or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

In *Pacific Live Stock Co. v. Davis*, 60 Ore. 258, a division of the waters of a stream was made by the court as between riparian owners.

The statutes involved here require notice to each riparian owner (Sections 13 and 14) and no distinction is made between riparian owners and appropriators, but each is required to establish his rights, no matter what the character of his claim. The object of the proceeding is to apportion the water among riparian owners and appropriators, as their several rights appear, and the entire stream or body of water is the *res* or subject matter of the proceeding. Section 6595, Lord's Oregon Laws, subdivision 8, reads as follows:

All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association or corporation, any riparian rights where no such rights existed prior to the time this act takes effect. (Laws 1909, Chap. 216, p. 340, Sec. 70.)

Accordingly, the court, in *In Re Willow Creek, supra*, apportioned the waters of the stream among the riparian owners and the several appropriators, in a proceeding brought under this act.

Under the water law of Oregon, a mixture of riparian rights and rights of appropriation on the same stream system is possible and is generally found to exist. In such case, the extent of the riparian rights and of the rights of appropriation must be determined and fixed in the decree, the rights of each claimant being separately determined.

While an appropriator is a tenant in severalty in respect to the water of a stream, yet, until the extent of his right is

determined, he may be said to be an owner in common with other appropriators of the water, or subject matter, and his several right cannot be definitely ascertained until an adjudication of all the rights has been made. It is said by Mr. Kinney, in his work on "Irrigation and Water Rights," Sec. 1531, p. 2754, Vol. 3 (2 ed.) :

Although a person may make a valid prior appropriation of the water of a natural stream or other source of natural water supply, he may record his notice in accordance with the law, he may apply the water to some beneficial use or purpose for many years, he may lay claim to his rights adversely to all the world, and yet this is not deemed a sufficient determination of his rights, for the reason that there may be many others who have made like appropriations from the same sources of supply, and whose claims are bound in time in some manner to conflict with the claims of the prior appropriator. Simply because a person lays claim to certain rights, although he does it by means of notice to all the world, and while it may put others on their guard, is no proof of the validity of his claim.

An appropriator cannot be regarded strictly as a tenant in severalty, or as more than an owner in common with other appropriators, until his rights have been adjudicated and decreed.

Mr. Wiel, in his work on "Water Rights in the Western States," p. 678, Sec. 624 (3 ed.), says :

Owing to the fact that water suits deal with rights of numerous people (and, as settlement advances of whole communities) in a common and to a large extent indivisible supply, procedure is frequently complicated because of the large number of rights involved at the same time; further, because of the fluid nature of the subject now matter of the litigation, "which does not stay quiet in a certain place, but is always running from one place to another;" because, moreover, of its fluctuating volume or condition with the varying seasons, localities and surroundings.

It is apparent that this proceeding is not comparable to a suit to quiet title. It is not instituted by any claimant for that purpose, but is initiated by the

state itself, and for the purpose of apportioning the use of the water among all those found entitled to its use, in accordance with the respective rights of each. It is essentially comparable only to a suit to partition the waters among many claimants, who are claiming portions of the whole stream or body of water.

It is, therefore, evident that a determination as between two or three of many claimants will not accomplish the division of the use sought to be accomplished.

In the case of *Rickey Land & C. Co. v. Miller & Lux*, 218 U. S. 258, Miller & Lux brought a bill in equity in the Federal District Court to enjoin one Rickey and other defendants, from interference with its use of the waters of a stream. Rickey appeared and answered, and, after appearing, organized a corporation, to which he conveyed his lands and water rights, and subsequently this corporation began two actions in the state court to quiet title and establish its prior right. Miller & Lux and the defendants other than Rickey brought a bill in equity to restrain the proceedings in the state court by the Rickey corporation, on the ground of priority of jurisdiction of the federal court. The court said:

We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states. (P. 262.)

It is obvious that this case and the proceeding here involved are not at all comparable. In the first place, Rickey, a defendant in the prior suit, sought to defeat the jurisdiction of the federal court by organizing a corporation, and then bringing suit in a state court against the plaintiffs in the federal court. The issues and the parties were the same in both cases.

But in these proceedings, an entirely different case is presented from the issues in the suits in question. In the suits only a part of the entire volume of the stream is involved, as between only the parties to the suits, and only the relative rights of those parties as among themselves,

while the proceedings before the Board embrace the entire stream as a subject matter, and involve all claimants. The state is the moving party in these proceedings. Thus, the parties are entirely different, and the subject matter is different. The purposes of the proceeding and of the suits differ so essentially and materially that there hardly seems to be any justifiable comparison.

We submit, therefore, that even if we have here a judicial proceeding before a tribunal, judicial in character, and having concurrent jurisdiction with the federal court of the subject matter, yet the federal court never acquired jurisdiction by the suits in question, of either that subject matter, or of the parties, for the purposes contemplated by these proceedings. Although incidental to the Board's general determination, questions in issue in such suits before the federal court may come before the Board for its determination, yet we submit that any decrees in such suits will not constitute a bar to these proceedings, nor prevent the subsequent institution of them. The case comes clearly within the rule laid down in *Buck v. Colbath*, 3 Wall. 334, 345, and *Watson v. Jones*, 13 Wall. 679, quoted *supra*.

If appellant's contentions in respect to these prior suits were correct, necessarily it would follow that the Board would be prohibited from initiating a proceeding to determine relative rights to the waters of a stream which had been theretofore involved in prior litigation in the federal courts. As this is the case with nearly every important stream in the state, the legislation in question would be futile and ineffective. The presence of all parties being necessary, the elimination of any of them by the process suggested by counsel for appellant would effectually block the enforcement of these statutes, and future distribution.

That the subject matter of the present proceeding, the purpose thereof, the parties thereto, and the general nature of the same, are different, is clearly apparent. The necessity for bringing all parties in, in the ordinary equity suits, was pointed out in *Hough v. Porter*, 51 Ore. 318. An excellent illustration of the necessity for a determination *in toto*, rather than by piecemeal, of the waters of a stream is given on pages 368 and 369, of that opinion, where Mr. Justice King says:

It is manifest that plaintiff, in the first instance, could have made as defendants all persons along the stream and on its tributaries and branches, against whom she might have claimed adversely. (B. & C. Comp., Sec. 394.) Although some may not have been necessary, all would have been proper parties to the suit. (*Williams v. Altnow*, 51 Ore. 275; 95 Pac. 200, 208.) But as to the interruptions by Small and those using water through the Small ditches and in connection therewith, it is apparent from the character of the testimony adduced, that in order to properly determine the rights of Hough and Porter, they were necessary and were properly made defendants, for if true, as claimed by Porter, that he let sufficient water pass his premises to supply Hough's needs and demands, the court could not have determined who was entitled to the use thereof, as between Small and Hough, or between Small and Porter, or Porter and Hough, as the case might have been, unless they were parties to the suit. To illustrate: Assume the court had determined the respective rights of Hough and Porter in the first suit under the first amended complaint, and had found there were 460 inches in the stream during the low-water season; that Hough was entitled to the first 100 inches, and had entered a decree to that effect; and that after the entry thereof Porter had diverted water for irrigation purposes, by reason of which he was cited to appear and show cause why he should not be held for contempt of court, but at the hearing should have proved that he used 100 inches only, leaving 360 inches to pass his headgate. Would he then have been in contempt because the water passing his point of diversion did not reach plaintiff? In other words, could he be held for the interference by Small, or others not parties to the suit? This illustration serves to demonstrate the ineffectiveness of a decree entered under such circumstances. Numerous instances occur where the rights between two persons can be, and have been, determined without bringing in others; for example, assume that A and B are at the head of a stream, and B, who is below A, has the first right to 100 inches of water. A suit to enjoin A from a wrongful interference could easily be maintained, where there was no one diverting water from the stream between their respective points of diversion, for a decree in that case favorable to B, it can readily be seen, would be effective, as it would be such that its violation could be punished. Such a decree, it is true, would not

bind others not parties to the proceeding, but it would be efficient as between the parties to it, and constitute an adjudication of their respective rights, of which either could avail himself in the event both should subsequently be joined with others in litigation over the same stream. Many of the suits where water rights have been adjudicated have been of this class, and the decrees have accordingly been effectual, while a large number, no doubt, have passed through the courts and to final decree as between a few on the stream, when, to have afforded a complete remedy, and to have avoided a multiplicity of suits, others should have been made parties, as was done in the case under consideration; but the failure to do so in such cases has been due to the point not having been raised, nor the court's attention called to the status of litigants in this respect. It is manifest that in the suit under consideration the rights of any of the three parties named could not have been determined with respect to each other without all being in court, and the same could be said of others along the stream.

The court here points out the ineffectiveness of such suits and decrees as appellant pleads in bar of these proceedings. That decrees as between two claimants, or a few only of many, cannot be deemed a bar to a general determination of the rights of all claimants is too plain, we submit, to admit of much argument. It necessarily follows, of course, that prior decrees are effectual and binding on the parties and are to be recognized in a subsequent determination of the rights of all claimants, in so far as the matters and things therein determined are involved in the subsequent proceedings.

If appellant's contentions were correct in principle, it would follow that these defendants in the prior suit would be prevented from protecting their rights as against parties in the proceedings who were not parties to those suits, as well as against appellant. Many questions may arise as between such defendants in a determination of all the rights, which could not possibly have been involved in such prior suits, and which those suits were not intended to determine. But, more than that, questions of importance, not so involved, are presented by these proceedings, because of the State's interest as a party. To protect the State's interest in the stream, whether that interest arises out of its proprie-

tary character, or rests upon the broader ground of public policy and its police powers, the necessity for the presence of all claimants is apparent, and the elimination of any of them would necessarily result in denying to the State the right to exercise the full measure of those police powers, which its rights of sovereignty, protected and recognized by the Federal Constitution, guarantee to it.

The difference in the essential character of these prior suits, and a suit in equity for a complete adjudication of all the rights to the waters of a stream system is well illustrated by the equity procedure which has been heretofore followed in Oregon in disputes over the use of water.

Two methods of protecting water rights have been followed in Oregon, in the equity courts. Both are based upon an actual interference with the use and rights of the plaintiff, and are for the purpose of obtaining relief by injunction.

In the case of *Umatilla Irr. Co. v. Umatilla Imp. C.*, 22 Ore. 366, it was held that a corporation having only an uncompleted or inchoate right of appropriation, and which had not diverted any water could not maintain a suit to quiet title to the waters of the stream claimed by it in certain location notices, and that, in the absence of an actual interference with its rights, a court of equity had no power to determine the priority of plaintiff's rights or the relative rights of the defendants. In this case no relief was asked other than a determination of the priorities involved. The court, in effect, held that a suit to quiet plaintiff's title could not be maintained.

Until the suit of *Hough v. Porter*, 51 Ore. 318, was decided, no Oregon case can be cited which attempted to make a determination of the relative rights of all claimants to the waters of a stream.

In *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, it was contended by certain of the defendants that the relative rights of the defendants as between themselves should be determined as well as plaintiff's, and a complete determination made. The purpose of the suit was to protect the priority of plaintiff's appropriation by injunction. The court refused to make a determination of rights as between the defendants, because of the failure to formulate the pleadings so as to

raise issues as between them (p. 83). The only determination made, consequently, was as to the priority and extent of plaintiff's appropriation, and the object of the suit was an injunction.

Hough v. Porter, supra, we have already referred to. The object of that suit primarily was to protect, by injunction, the plaintiff's title to the water. All parties were brought in by order of court and required to interplead, and, upon the issues made as between the parties, the relative rights of all were determined. This is the first case coming before the Supreme Court of Oregon where this course of procedure was followed, although, as intimated in *Nevada Ditch Co. v. Bennett, supra* (p. 83), it could have been done in other cases, if the issues had been properly made by the pleadings so as to permit of such determination.

In *Whited v. Cavin*, 55 Ore. 98, the question of a determination of the relative rights of defendants, as well as the plaintiff's rights, came again before the court, but in that case, the court held the record disclosed no issues as between them (p. 112), and, although such determination might have been made, had the pleadings been framed to that end, yet the court could not, because of the state of the pleadings, make a determination of the rights of defendants, but only of the plaintiff as against them.

In *Caviness v. La Grande Irrigation Co.*, 60 Ore. 410, 429, the same question was raised with regard to the defendants, and it was held that in the absence of issues on the subject, the court could not properly make a decree affecting the relative rights of defendants as to each other. The rights of the plaintiff were accordingly determined as against all of the defendants, without reference to possible disputes among the latter and without determining their rights, or the priority or extent thereof, or more than that plaintiff's right was entitled to priority as against all of the defendants. Among other cases in which the same rule was followed (without reference to it, however,) are *Davis v. Chamberlain*, 51 Ore. 305, and *Watts v. Spencer*, 51 Ore. 262.

In *Jones v. Conn.*, 39 Ore. 30, the same rule was applied in a suit wholly between riparian owners. While it was said (p. 37) that "for the protection of the rights of several riparian proprietors it has even been held that a court of

equity may in a proper case apportion the flow of the stream" (p. 37) among the proprietors, yet because of the inability of the court to frame any other decree than one enjoining defendant from diverting the water to the substantial injury of the rights of the plaintiffs, it would be impossible to ascertain and determine the respective rights of the parties. Doubtless the state of the record was responsible for this refusal. It will be noticed that here there were several plaintiffs and but one defendant. In *Hough v. Porter*, 51 Ore. 318, 380, the power to apportion the use of water among riparian owners was recognized, if the record was made sufficient for that purpose. The Water Code clearly provides for the determination of the relative rights of riparian owners as well as appropriators, and the determination of the extent of a riparian right was in fact made in the case of *In Re Willow Creek*, 74 Ore. 592, 627.

In the case of *Little Walla Walla Co. v. Finis*, 62 Ore. 348, the relative rights of all claimants were determined, as in *Hough v. Porter*, *supra*.

We have, therefore, two distinct classes of suits involving the use of water, having distinct and different purposes.

The first class, and the one most commonly followed, includes those brought to determine the relative rights of the plaintiff or plaintiffs as against the defendant or defendants, for the sole purpose of determining whether the plaintiffs or the defendants shall be entitled to an injunction. In general, the courts, in these cases, determine the rights only of the prior claimants, the relative rights of subsequent claimants as among themselves remaining undetermined. Such cases may arise as between one plaintiff and one defendant (*Hindman v. Rizor*, 21 Ore. 112); one plaintiff and several defendants (*Nevada Ditch Co. v. Bennett*, 30 Ore. 59; *Caviness v. La Grande Irr. Co.*, 60 Ore. 410); several plaintiffs and one defendant (*Jones v. Conn.*, 39 Ore. 30); and several plaintiffs and several defendants (*Whited v. Cavin*, 55 Oregon, 98; *Davis v. Chamberlain*, 51 Ore. 304).

In all of these cases the purpose of the determination is to award relief by injunction to the prevailing party or parties on the one side, as against the parties on the other side, no attempt being made to determine the relative rights of the several parties on either side as between themselves.

The other class of cases includes those in which the object of the suit is a complete determination of the relative rights of all the parties, irrespective of their character as plaintiffs or defendants, and by a general adjudication settle and determine the rights of all claimants diverting water from a stream system. *Hough v. Porter*, 51 Ore. 318, and *Little Walla Walla Co. v. Finis*, 62 Ore. 348, are illustrations of this class. The proceeding in these cases may be analogous to a suit to quiet title in some respects, but it more nearly corresponds to a general partition suit, in so far as it can properly be said to resemble any suit affecting title to land, as distinguished from the right to use water. As said in *Hough v. Porter*, 51 Ore. 318, 439: "Water suits are, in a sense, *sui generis*."

It is obvious that the relief afforded in the first class of cases is not the same as in the second class, nor can the first class of cases be said in any sense to attain the objects and purposes of the second class.

Finally, it is quite obvious that a decree entered in a prior suit of the first class between two claimants, would not be a bar to the subsequent institution of a general adjudication suit, of the character of the second class to include the parties in such prior suit, although such decree would be binding as to the rights of the prevailing parties in so far as those rights were involved in a determination of the relative rights of all the claimants.

For instance, to follow out the illustration from *Hough v. Porter*, 51 Ore. 318, 369, heretofore quoted, if the Pacific Live Stock Company should secure a decree in a prior suit in the federal court, enjoining the defendants from diverting water until its superior rights were satisfied, and several other water users not parties should divert water, although their rights were subsequent in time to those of the defendants enjoined, a condition would arise where the cause of the interference with appellant's use would be impossible of determination in the distribution of the water, whether by the defendants enjoined or the other water users.

The situation would be complicated by a difference in the priority of the rights of the defendants, and, those rights not having been determined, it would be impossible to ascer-

tain which of them was causing the actual interference, and violating the decree. Can it possibly be contended that in such state of affairs a court of equity would be powerless to protect these defendants, because of the prior decree? It would, we submit, in such event be entirely practicable, as well as equitable, for any of the defendants to institute a subsequent suit to determine all of the rights, in which the court would take notice of the prior decree and interpret it, and it would be merged in and made a part of the final decree.

The case of *Pacific Live Stock Co. v. Hanley* seems to have originated some time in 1899, when the appellant filed a bill in equity in the United States Circuit Court to enjoin Hanley and others from diverting the waters of Silvies River (98 Fed. 327). The suit appears to have gone to a decree, and in 1908, a supplemental bill in equity was filed by appellant against Hanley and others, to enforce this prior decree (200 Fed. 468). The Circuit Court of Appeals seems to have remanded the cause with directions to modify the decree in certain particulars. The purpose of this suit was to enforce the provisions of the prior decree. It was not brought to secure a determination of the relative rights of the several claimants, nor was it possible, under the issues made in the case to make such a determination. It is clearly not a suit for general adjudication of the rights of all parties involved, nor more than to determine to what extent the defendants should be restrained from interfering with appellant's rights.

The case of *Pacific Live Stock Company v. Silvies River Irrigation Co.* (and another) was brought by appellant against two defendants, to enjoin them from diverting any water above appellant's land. (200 Fed. 487, 489.) This cause was remanded with directions to allow the parties to proceed under the Oregon statutes, and have their rights determined in the general adjudication therein provided for, or to otherwise proceed to a determination of the issues between the parties according to the laws of the State upon the subject of riparian rights, which, the court said (p. 49), recognized "the rights of riparian proprietors to a limited extent only" and provided for the "right of appropriation of water of the nonnavigable streams of the state for beneficial uses."

It is quite plain that, although the parties to this suit may refuse to follow the Oregon statute, and proceed to final decree, yet such decree will not be a bar to the statutory proceedings. Nor, do we think, would it be a bar to a suit for the general determination of rights to the waters of Silvies River in the equity courts of the State, although binding on the parties to it in so far as the *relative* rights of such parties therein are involved. It is obvious that both suits belong to the first class, in our illustration, and are essentially different in their nature and character from the suits we have placed in the second class, for purposes of illustration.

The essential difference between these prior suits and the statutory proceedings are much more marked. The suits we have attempted to classify involve the rights of private parties only, the relief afforded by the decrees therein are for the protection of private rights, and no cognizance, except, perhaps, indirectly, is taken of the public interest or the right of the state, under its police powers, to protect its natural resources. Thus, we often find cases wherein decrees have been rendered granting to the immediate litigants quantities of water far in excess of their needs, without consideration of the many claimants who may have vested rights to the use of the same waters, but are not parties to the suit. Often decrees have been entered in this private litigation absolutely dividing all the waters of a stream between the parties to such decrees, regardless of the fact that many other claimants are diverting water from the same stream by virtue of rights, perhaps superior to any involved in such decrees. The existence of these decrees is a matter of common knowledge in the arid region.

We submit that the prior suits in the federal court cannot be pleaded in bar of these proceedings, however binding and conclusive decrees therein may be upon the parties to them, and that these proceedings do not in any way interfere with the jurisdiction of the federal court to proceed with its determination of the matters at issue in such suits; that the parties to those suits are necessary parties to these proceedings, and without them the determination and adjudication to be made would be entirely ineffective.

VII

THE ALLEGATIONS OF THE BILL OF COMPLAINT AS TO CERTAIN THREATENED ACTS AND PROPOSED FUTURE ORDERS AND REGULATIONS OF THE BOARD, WHICH, IT IS ALLEGED, WILL IMPAIR APPELLANT'S VESTED RIGHTS, DO NOT BRING THIS CASE WITHIN THE CLASS OF CASES ARISING UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT, AND RAISE NO FEDERAL QUESTION.

A large part of the bill of complaint herein is devoted to charges of certain threatened actions upon the part of the members of the State Water Board, which have no foundation in fact, but as such allegations relate to possible future conduct of the Board, no necessity for raising an issue of fact relative thereto arises in this case.

So, it is alleged that appellant will be compelled to pay all of the expenses of the proceeding (p. 35, appellant's Brief), in addition to the fees required by statute. No such construction of the statute is possible, and the fact is obviously otherwise. See *Pacific Live Stock Co. v. Cochran*, 73 Pacific, 417, to which reference has been heretofore made.

Again, it is alleged that the statute compels appellant to assume the burden of proof, and if it does not do so, the rights which are not contested will be allowed. The statute nowhere attempts to compel appellant to assume the burden of proof, either in contests or otherwise, except as in any other case, but if it did, as we have shown heretofore, this would be merely a changing of a rule of evidence which is within the legislative power.

No provision of the statute requires the Board to allow uncontested claims, and if such claims are allowed, as held in *In Re North Powder*, 75 Ore. 83, appellant may object to them in the circuit court, and will not waive his right to object by failing to contest before the Board.

It is true that, pending the determination in the circuit court, the Board may proceed to assume control over the stream system, and distribute the water, according to its determination, for administrative purposes, as held in *Ormsby County v. Kearney*, 37 Nev. 314, cited and quoted

from so extensively by appellant. It is also true that unless appellant appears in the proceeding, and submits proof of its rights, it will be thereafter barred from asserting such rights, as it would be in any other proceeding, suit or action, in which it became involved.

But, more particularly, the threatened acts of the Board are set forth at pages 30 and 31 of appellant's Brief. None of these threatened acts are permissible under the statute, and are entirely inconsistent therewith and with the decisions of the courts of the State interpreting the act. At any time the Board should exercise so arbitrary and unwarranted authority as appellant insinuates it is about to assume, application to the State courts will obtain for appellant immediate relief, and it is time enough to consider these questions when those courts have refused such relief. This subject is discussed in the case of *Monangahela, etc., Co. v. U. S.*, 216 U. S., 177; 54 L. Ed. 435, 443, where the court said:

Learned counsel for the defendant suggests some extreme cases, under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

The act in question is designed to protect vested rights. The court in *In Re Willow Creek*, 74 Ore. 592, 616, said:

The first section of the act declares that nothing therein contained shall be so construed as to ~~take~~ away or impair the vested right of anyone to any water; and Section 70, Subdivision 1, to the same effect. Any appropriation of water under the provisions of the act is thereby made subject to such condition. In the absence of such legislative announcement the lawmakers have no power to destroy such a right. The main purpose of the law is to protect water rights and to promote the utilization of the same. The right to the use of water is a valuable

property right guaranteed to every citizen. It cannot be arbitrarily nor unreasonably interfered with by the legislative department of the State.

It will be presumed, of course, that the State Water Board will obey the law, and perform its duties according to the law, and in accordance with the interpretations of the law made in this and other decisions of the Supreme Court of the State. It is obvious that any failure in this respect, on the part of the Board, would be quickly remedied upon application to the courts of the State. It was said in *U. S. v. Delaware, etc., Co.*, 213 U. S. 366, 416:

We think it unnecessary to consider at length the contentions based upon the due process clause of the fifth amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the government construed it. For the purpose of our consideration of the subject, it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation.

And, as stated in *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 171, a state statute will not be interpreted to produce abnormal or extraordinary results, by strained implication, in the divesture of rights or property. The court said:

On the contrary, such interpretation could only be warranted if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction. Coming to consider the act, it is patent that neither by express language nor by necessary implication does it convey the meaning which the proposition seeks to give it.

CONCLUSION

In the light of the many authorities we have submitted, and the many more which we might cite, we confidently assert that the case presented by appellant is not such as to invoke the favorable consideration of this court.

The issue, as we see it, is substantially whether the State may control the use of its natural resources, through a valid exercise of the police power, for the advancement of the material welfare of the whole State, and put an end to the interminable litigation which has so materially retarded the development of Eastern and Central Oregon. The use of the waters of the natural streams of this State and the application thereof to the arid lands within the State, is essential to the well being of the inhabitants of the State, and the extension of that use to the vast unproductive area, wherever possible, with due regard to the preservation of existing and vested rights, is necessary to the prosperity of the people of the State. It is the right to regulate and control, protect and preserve the use of these waters which is here involved.

Should the contentions of appellant be sustained, it means that the efficiency of the laws of State control, not only in Oregon, but elsewhere, will be seriously impaired. Laws of a similar nature have been in force in several Western States for many years. They have been upheld by the courts and generally acquiesced in by the people of these states. Titles to water have been adjudicated and rest for their protection upon the validity of the many decrees and determinations which have been made. Improvements have been made, development has ensued, and a system of distribution has been provided for, and future development, to a considerable extent, will depend upon the continuation of the effectiveness of these laws.

It was well said by Mr. Chief Justice Potter, in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, in passing upon the constitutionality of the Wyoming statutes (p. 122):

It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration. Notwithstanding the settlement of the fundamental doctrine and its recognition by our constitution and statutes, the law respect-

ing it in many of its phases may be said to be still in course of development, and compared with other questions which are likely to arise relating to this general subject, it is probable that none will exceed in importance those involved and submitted for determination in this controversy. They strike at the root of the system adopted in this state for the supervision and distribution of the appropriated waters.

And at another point in the same case it was said (p. 134) :

This raises a question of vital importance, especially when we consider that during the nine years intervening since the creation of the board, it has proceeded in pursuance of the statutes, to determine the priorities of claimants upon numerous streams, and that its certificates, issued therein, constitute the evidence of a large number of water rights. That fact is not to preclude a careful investigation of the serious question presented, nor to control in its disposition, except possibly in so far as it is entitled to weight as showing the construction of the law on the part of the administrative or executive department, and further, perhaps, in connection with the elementary principle that a statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional.

The Oregon Water Code has been in force more than six years, during which time many stream systems have been adjudicated, and many decrees entered finally adjusting rights to water in accordance with the statute. (See map at back of this Brief.) Several have gone to the Supreme Court of the State. *In Re Willow Creek*, 74 Ore. 592; *In Re North Powder River*, 75 Ore. 83; *Claypool v. O'Neill*, 65 Ore. 511.

In *Cookingham v. Lewis*, 58 Ore. 483, at page 494, it was said :

The reclamation of the desert public lands is a public enterprise, and is under the control and direction of the State, and the applicant for a permit to appropriate or impound water for the reclamation thereof is to some extent the agent of the State, and has right to exercise the power of eminent domain

and by statute is to have a lien upon the lands for the repayment of the amount of his expenditures and interest. Therefore, the private interests of the applicant for a permit must be subordinate to the public interest contemplated by the statute.

And at page 497 of the same case:

In the report of the Commission to the Governor of date November, 1908, as to the conditions and possibilities under consideration, which is exhaustive on that subject, the defects of the former methods of acquiring water are set forth and the undertaking contemplated by the Commission outlined; namely, to conserve the surplus waters, as well as to settle and make definite water rights already existing as the only means of reclaiming arid lands of the State under the Carey Act (see pp. 66, 71 and 73 of the report), under the control of the State in a manner not possible by private efforts alone. It is stated by the Commission, at page 89 of the report, that "the desired laws (as to reclamation) can now be framed in harmony with the proposed legislation on the subject of water rights, which should be and is the necessary foundation of reclamation by the State." That statement shows that these laws were intended to be dependent upon each other, and to constitute a state system of water title as a basis of sale to arid land owners or to settlers upon such land. The grant of the Carey Act is upon the proviso that the State will assume the responsibility of reclamation, which includes the procuring of water therefor.

And at another point on page 498:

The whole purpose of the present system of water laws has been developed with a view to state control to reduce legislation to a system that shall accomplish this reclamation, together with the other uses of public water as a great public enterprise, carried out by an administrative system that will also accomplish a speedy adjustment of relative rights through these boards, not only of individual cases, but of the stream system.

The interest the public has in these adjudication proceedings is sufficiently shown by these cases.

Some extended reference has been made by appellant to certain discussions of adjudication proceedings before administrative boards, by Mr. Kinney in his work on Water Rights. On page 2428 of his work (Sec. 1341, Vol. 3, 2 ed.) this author says:

The power of a state legislature to enact laws for state control and for the government of the waters flowing within its boundaries and the regulation of their use is unquestioned. This comes strictly within the police power of the state, which is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life. Relative to the use of the waters flowing within the boundaries of a certain state, this police power is the authority to establish such rules of good conduct, which are calculated to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own, so far as reasonably consistent with the corresponding enjoyment by others of their rights. Whatever right one has, even in his own, is subject to that well-established principle that his use shall not be injurious to the similar rights of others. Such being the law as to private rights, to a much greater extent does the police power of a state apply to rights which are public, as is the case of the water within its boundaries, the right to the use of which is common to a large portion of the community. And, in this respect, it is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested.

And, after criticising the Wyoming statutes, this same writer makes this statement:

The Oregon law differs from that of Wyoming in the fact that instead of claimants being given a right of appeal from the orders of the Board of Control to the court, the court in each instance must confirm the order of the Board or make a new adjudication.

And at page 2896, that writer says:

In Oregon a final determination of the existing rights being by an adjudication of the court, an appeal can only be had from such a judgment to the Supreme Court.

And on page 2897, he says:

In Oregon the "decree confirming the determination of the Board" is, in fact, a judgment of the court.

A study of the criticism made by this writer clearly shows his criticism to be based upon questions of policy, rather than constitutional grounds, and principally upon the failure of the Wyoming and Nebraska statutes to provide for a final determination by the courts rather than by administrative boards, a fault, if it be such, which can not be justly said to exist in the Oregon system of state control. But we submit that these matters of policy are not for the courts, but are for the law making body of the State to decide.

We find nowhere in appellant's Brief reference to the case of *In Re Willow Creek*, 74 Ore. 592, or *In Re North Powder*, 75 Ore. 83, although both cases were decided over a year ago, and interpret these statutes in many particulars absolutely contrary to appellant's contentions. The contentions made by appellant overlook the real nature of the proceedings before the Board. It is entirely practicable and consonant with constitutional provisions to anticipate judicial action by preliminary administrative acts and determinations. Nothing in the Federal Constitution prevents a state legislature from providing for an administrative investigation preliminary to judicial proceedings in the courts of the state, and questions of policy in this respect are for that legislature to determine.

Appellant has not in any sense been deprived of any of its water rights. On the contrary, it has appeared and offered proof of its rights, and filed contests, and has been afforded, according to its bill of complaint, every opportunity the law affords to protect its rights, which, we contend, is ample for that purpose.

We believe that upon a consideration of the questions raised by appellant's bill of complaint and Brief herein that this court will agree substantially with the Federal District

Court that no constitutional guarantees to which appellant is entitled have been or will be infringed by these proceedings, if conducted according to the statute under which instituted; that appellant has no cause of suit, and the bill of complaint was properly dismissed.

Respectfully submitted,

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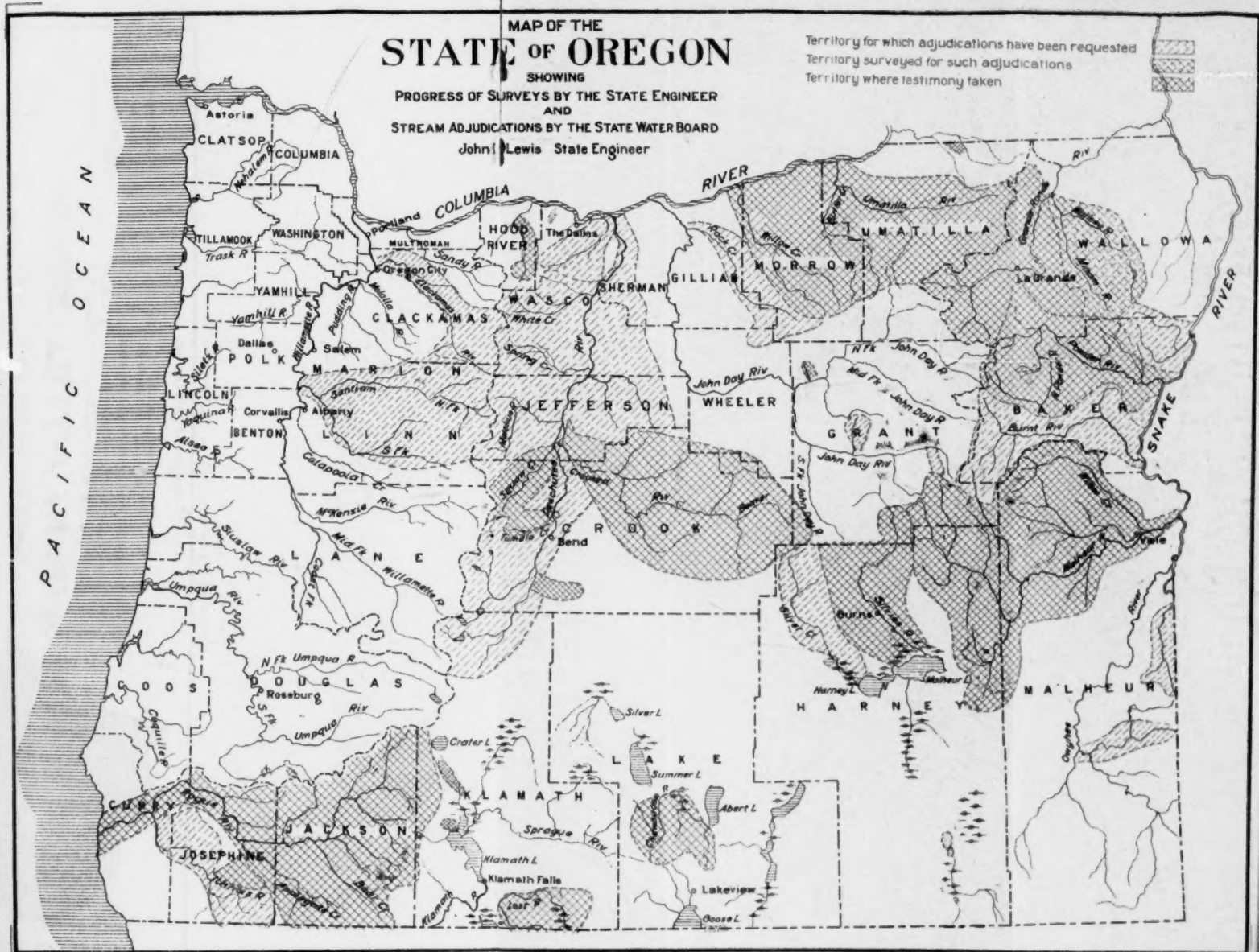


Figure 1. Showing progress of stream adjudications under the Water Code.

